A(I)ccess to Justice: How AI and Ethics Opinions Approving Limited Scope Representation Support Legal Market Consolidation

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A(I)CCESS TO JUSTICE: HOW AI AND ETHICS OPINIONS APPROVING LIMITED SCOPE REPRESENTATION SUPPORT LEGAL MARKET CONSOLIDATION

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ABSTRACT

Artificial Intelligence (AI) is changing our society and bringing the legal profession with it. The use of Generative AI (GenAI) in legal proceedings has received negative publicity from high profile mishaps in court filings. In one case, attorneys used the publicly available online GenAI tool, ChatGPT, to write a legal brief in which ChatGPT proceeded to make up its own citations. Following this, among other instances of the misuse of GenAI, courts have begun to require disclosures and limit the use of GenAI technology.

These prohibitions, however, are the result of a fundamental misunderstanding of the appropriate use of GenAI technology. ChatGPT's algorithm is not designed for use in legal research and writing. Westlaw Precision and Lexis+ AI, however, are examples of AI tools that are designed for legal research, including citations to actual cases. These tools provide a means of quickening legal research and writing that will lead to reduced costs.

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957

While the use of GenAI by self-represented (pro se) litigants may constitute unauthorized practice of law in some jurisdictions, currently available tools, like ChatGPT and Google Bard, are not intended for legal use. Limited scope representation and ghostwriting, however, will allow attorneys to provide legal services at a reduced cost to middle and lower income individuals using GenAI tools. Limited scope representation and ghostwriting allow attorneys to file court documents without making formal notices of appearance. In other words, an attorney provides their services for discrete tasks as opposed to formally representing a client in an entire legal matter. Limited scope representation has been ethically sanctioned by the ABA and many state jurisdictions as a means for access to justice. This Article will discuss how (1) the ethics opinions allowing limited scope representation and legal outsourcing provide the basis for enhanced use of AI technology, (2) publicly available online GenAI chatbots like ChatGPT and Google Bard, not programmed for legal research and writing, are causing problems in the courts, and (3) tailored GenAI for legal drafting, research, and writing will lead to more corporatization and access to justice for not only lower and moderate-income litigants but overall affordable legal services.

CONTENTS

INTRODUCTION

Artificial Intelligence (AI) is "the simulation of human intelligence processes by machines."[1] AI is beginning to be used more in society and across business sectors.[2] When it comes to its application to legal proceedings, "the genie is already out of the bottle."[3] High profile mistakes involving the use of readily available Generative AI (GenAI) programs ChatGPT and Google Bard in court proceedings are resulting in overreactions by the courts. These publicly available AI tools are not intended for legal research and writing of formal legal filings.[4] Their algorithms and programming often result in the misapplication or outright fabrication of caselaw.[5]

Notwithstanding the misreading of cases or made-up citations by ChatGPT and Google Bard, AI will have a place in the practice of law. Already, legal research giants Westlaw and Lexis are integrating GenAI.[6] Westlaw Precision offers fast and accurate legal research with

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1. Nicole Laskowski, *Artificial Intelligence (AI)*, TECHTARGET, https://www.techtarget.com/searchenterpriseai/definition/AI-Artificial-Intelligence [https://perma.cc/Q8BZ-4ELS] (Nov. 2023).

2. Emma Martinho-Truswell, *How AI Could Help the Public Sector*, HARV. BUS. REV., https://hbr.org/2018/01/how-ai-could-help-the-public-sector#:~:text=In%20addition%20to%20education%2C%20public,cases%2C%20and%20establish%20drone%20paths [https://perma.cc/QR2J-VUFJ] (Jan. 29, 2018); Katherine Haan, *24 Top AI Statistics and Trends in 2024*, FORBES ADVISOR, https://www.forbes.com/advisor/business/ai-statistics/ [https://perma.cc/3CGA-Z7XG] (Apr. 25, 2023, 5:04 PM); Pekka Salokannel, *The Impact of AI: How Artificial Intelligence Is Transforming Society*, 3DBEAR, https://www.3dbear.io/blog/the-impact-of-ai-how-artificial-intelligence-is-transforming-society#:~:text=AI%20has%20played%20a%20major,greater%20efficiency%20in%20many%20industr ind [https://perma.cc/5BCV-95TS].

3. Maura R. Grossman, Paul W. Grimm & Daniel G. Brown, *Is Disclosure and Certification of the Use of Generative AI Really Necessary?*, 107 JUDICATURE 69, 69 (2023).

4. *Legal AI vs. ChatGPT: What Makes Them Different?*, LEXISNEXIS: LEGAL INSIGHTS (Oct. 17, 2023), https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/legal-ai-vs-chatgpt-what-makes-them-different [https://perma.cc/XCA3-9L7K]; *see also* Benjamin Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT*, N.Y. TIMES (May 27, 2023), https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html [https://perma.cc/74EF-ZREF].

5. *See* Weiser, *supra* note 4.

6. *Westlaw Precision Now Has Generative AI*, THOMSON REUTERS,

the assistance of AI. Lexis+ AI uses GenAI for conversational legal research along with assistance in writing legal briefs. In response to the problems with using GenAI highlighted by ChatGPT and Google Bard, neither intended for legal research, Lexis+ AI provides links to proper legal citations.[7]

The progression of GenAI in legal matters naturally moves to use by self-represented or pro se litigants. The use of GenAI by unrepresented parties poses unique ethical questions for the legal system.[8] Though it is likely that GenAI will be viewed as unauthorized practice of law under these circumstances, innovations like limited scope representation and legal outsourcing have laid the groundwork for GenAI-driven lower cost legal representation. As one commentator observed, when it comes to "pro se litigants who do not seek attorneys out of fear of the cost of representation, there exists an opportunity for lawyers to get increased revenue."[9]

Lawyers can increase revenue in their practice by offering their services *á la carte*. In other words, rather than representing the client traditionally—through the duration of litigation or the procurement of transactional legal services—the lawyer can offer to do only a portion of those services at a reduced rate. The most common way of reducing costs by breaking up legal services is by limited scope representation. Limited scope representation, often in the form of ghostwriting, has

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https://legal.thomsonreuters.com/en/c/westlaw/westlaw-precision-generative-ai?gclid=EAIaIQobChMIyrPauoj5gwMVR4JaBR1eTw-fEAAYASAAEgL3LfD_BwE&searchid=TRPPCSOL/Google/LegalUS_RS_Westlaw_Main_Search_B Bran-All_US/AI&chl=ppc&cid=3492865&sfdccampaignid=7014O000001BkfQQAS&ef_id=EAIaIQobChM EAIaIQob5gwMVR4JaBR1eTw-fEAAYASAAEgL3LfD_BwE:G:s&s_kwcid=AL!7944!3!681703130762!e!!g!!westlaw%20ai&gad_sos our=1 [https://perma.cc/E8H7-7E6B]; *The AI Built for Legal Is Here*, LEXISNEXIS, https://law.lexisnexis.com/Lexis-Plus-AI-Launch-PPC-Google-Broad?utm_source=google&utm_medium=ppc&utm_term=ai%20and%20the%20legal%20profession& utm_campaign=&gad_source=1&gclid=EAIaIQobChMImreT-ob5gwMV31pHAR2Jsw8LEAAYAyAAEgLQL_D_BwE [https://perma.cc/UPL7-C2TE].

7. *See The AI Built for Legal Is Here*, *supra* note 6.

8. *See generally* Brooke K. Brimo, *How Should Legal Ethics Rules Apply When Artificial Intelligence Assists Pro Se Litigants?*, 35 GEO. J. LEGAL ETHICS 549 (2022).

9. Kristen M. Blankley, *Adding by Subtracting: How Limited Scope Agreements for Dispute Resolution Representation Can Increase Access to Attorney Services*, 28 OHIO ST. J. ON DISP. RESOL. 659, 695 (2013) (footnote omitted).

the attorney write briefs on behalf of the client that the client will file directly with the court as a pro se or unrepresented litigant.[10] Another way to reduce costs is by outsourcing legal services to foreign lawyers and law firms.

All of these cost-saving measures are ethically approved and encouraged by the American Bar Association (ABA) and state bars as a way to increase access to justice among lower and middle-income individuals and families.[11] The convergence of AI with limited scope representation will lead to a corporatization of legal services for low- and middle-income clients—a TurboTax-like model (or, if you will, a "TurboLaw" model) for providing legal services at a lower cost. This Article discusses (1) how the ethics opinions provide a basis for the enhanced use of AI technology in limited scope representation and legal outsourcing;[12] (2) how publicly available online GenAI chatbots like ChatGPT and Google Bard, not programmed for legal research and writing, are causing problems in the courts;[13] and (3) how tailored GenAI for legal drafting, research, and writing will increase both access to justice for lower and moderate-income litigants and the overall affordability of legal services.[14]

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10. Jona Goldschmidt, *In Defense of Ghostwriting*, 29 FORDHAM URB. L.J. 1145, 1146–47 (2002).

11. *See* D.C. Bar, Ethics Op. 330 (2005); *Limited Scope Representation*, TEX. ACCESS JUST. COMM'N, https://www.texasatj.org/limited-scope-representation [https://perma.cc/T6ZF-UGVJ]. *See generally* MARK H. TOUHEY, STEVEN O. ROSEN, HON. LAURIE D. ZELON, SUSAN M. HOFFMAN, THOMAS A. MARRINSON, MICHAEL A. MILLEMAN, CHRISTINA M. TCHEN & DAVID J. VAN SUSTEREN, AM. BAR ASS'N, SECTION OF LITIG., HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 4 (2023).

12. *See infra* Section I.

13. *See infra* Section II.

14. *See infra* Section III.

I. THE ETHICALLY PERMISSIBLE BALKANIZATION OF LEGAL SERVICES

A. Limited Scope Legal Representation

Limited scope representation is where "[i]nstead of entering a notice of appearance and representing the client in all aspects of the case, the lawyer only provides limited or discrete services."[15] Limited scope representation is also referred to as "Discrete Task Representation,"[16] "Alternatives to Full-Time Representation,"[17] and "unbundling."[18] The D.C. Bar describes unbundling as "the separation of the tasks full service lawyers typically conduct into their discrete components."[19] Examples include drafting pleadings and legal documents and providing targeted advice. Under this scheme, a "client can be in charge of selecting from lawyers' services only a portion of the full package and contracting with the lawyer accordingly."[20]

Economics is a driving force behind the movement toward limited scope legal services.[21] Unbundled legal services provide the client the opportunity to "specify the depth or extent of each service."[22] The unbundling reduces overall costs, leading to lower fees that correlate with timely payment from clients.[23] As the D.C. Bar observed, "clients may save considerable sums."[24] Low- and middle-income clients can more likely "afford to obtain legal services" on this "pay-as-you-go basis."[25]

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15. Goldschmidt, *supra* note 10, at 1146.
16. Forrest S. Mosten, *Unbundling of Legal Services and the Family Lawyer*, 28 FAM. L.Q. 421, 422 (1994).
17. *Id.*
18. D.C. Bar, Ethics Op. 330 (2005).
19. *Id.*
20. Mosten, *supra* note 16, at 423.
21. *Id.* at 426 ("The profession is beginning to recognize its vulnerability in the marketplace as clients are increasingly self-representing . . . .").
22. *Id.* at 423.
23. *Id.* at 425.
24. D.C. Bar, Ethics Op. 330 (2005).
25. *Id.*

Breaking down legal services *à la carte* may not be appropriate in all circumstances:

> Lawyers should consider several factors in determining whether limited representation is appropriate, including the capacities of the client, the nature and importance of the legal problem, the degree of discretion that decision-makers exercise in resolving the problem, the type of dispute-resolution mechanism, and the availability (or not) to the client of other self-help resources.[26]

The New York City Bar urges attorneys considering providing limited scope representation to "independently evaluate whether the complexities of the case or the limitations of the client make it unlikely that the client could effectively proceed pro se."[27] The D.C. Bar cautions that more complex issues may be more suitable for full representation by an attorney or law firm.[28]

Limited scope representation has also found support from the ABA and state bars for increasing access to justice for low- and middle-income individuals and families in need of legal assistance.[29] For example, the Texas Access to Justice Commission, which advocates for greater legal representation for low-income individuals and families, supports limited scope legal representation.[30] Indeed, the Commission provides attorneys with webinars and "tool kits" to assist with representing low- to moderate-income clients on a limited scope basis.[31] The kit "includes a sample service agreement, sample task and issue assignment checklists, sample notice of limited representation, and sample motion to withdraw."[32] D.C. Rule 1.2 allows limited scope

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26. TOUHEY ET AL., *supra* note 11, at 59.
27. N.Y.C. Bar Ass'n, Formal Op. 2005-01 (2010).
28. D.C. Bar, Ethics Op. 330 (2005).
29. *See supra* note 11 and accompanying text; *see, e.g.*, D.C. Bar, Ethics Op. 330 (2005).
30. *Limited Scope Representation*, *supra* note 11.
31. *Id.*
32. *Id.*

legal representation if "the client is fully informed of the limits . . . and those limits do not bar the provision of competent service."[33]

The ABA Model Rules of Professional Conduct support the expansion of access to justice measures that reduce lawyer fees.[34] Rule 1.2 expressly allows for limited scope representation arrangements.[35] Rule 1.2(c) provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."[36] Informed consent is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[37]

Comment 6 indicates that lawyers may limit the scope of their legal services by agreements with clients or under their terms of service.[38] The example given in the comment is representation under an insurance policy on behalf of the insured.[39] The representation may be limited to only those matters arising under the insurance policy, to the exclusion of other related legal issues.[40]

Limited scope representation is again viewed as a cost-saving measure that will lead to more business for attorneys while increasing access to justice for low- and middle-income individuals and families. Comment 7 provides lawyers and clients with "substantial latitude" to narrow the scope of representation.[41] The limitation in scope, however, "must be reasonable under the circumstances."[42] The example

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33. D.C. Bar, Ethics Op. 330 (2005); D.C. RULES OF PRO. CONDUCT r. 1.2.

34. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. 5 (AM. BAR ASS'N 2024). The ABA Ethics Commission stated that Rule 1.2 is "intended to provide a framework within which lawyers may expand access to legal services by providing limited but nonetheless valuable legal services to low- or moderate-income persons who otherwise would be unable to obtain counsel." A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 59 (ART GARWIN ed., 2013).

35. MODEL RULES OF PRO. CONDUCT r. 1.2(c) (AM. BAR ASS'N 2024).

36. *Id.*

37. *Id.* r. 1.0(e).

38. *Id.* r. 1.2 cmt. 6.

39. *Id.*

40. *Id.*

41. MODEL RULES OF PRO. CONDUCT r. 1.2(c) cmt. 7 (AM. BAR ASS'N 2024).

42. *Id.*

provided in the comments to the rule is one where the attorney limits representation to an informational "telephone consultation."[43] An example of unreasonableness would be if the phone call was too short to answer the client's questions properly.

When parties enter into a limited scope arrangement, jurisdictions are divided on whether to require an agreement that clearly explains the scope of representation in writing.[44] In Formal Opinion 472, the ABA observed that although Rule 1.2 does not require an agreement to enter into a limited scope representation arrangement, the committee in Formal Opinion 472 "recommends that . . . [lawyers] confirm with the client the scope . . . in writing" consistent with Rule 1.5(b).[45] Those aspects of representation not covered by the limited scope agreement "will typically fall to the client to perform or not get done at all."[46] Maryland requires a limited scope services agreement to be memorialized in writing.[47] New Hampshire and the D.C. Bar encourage but do not require limited scope representation agreements to be in writing.[48]

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43. *Id.*

44*. See Unbundling Resources by State*, AM. BAR ASS'N, https://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/pro_se_resources_by_state/ [https://perma.cc/T5QB-ZMUY] (providing an outline of each state's rules regarding limited scope representation agreements and demonstrating that some, but not all, states require such agreements to be put in writing).

45. ABA Comm. on Ethics & Pro. Resp., Formal Op. 472, at 3 (2015); MODEL RULES OF PRO. CONDUCT r. 1.5(b) (AM. BAR ASS'N 2024). Rule 1.5 states:

> The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client.

MODEL RULES OF PRO. CONDUCT r. 1.5(b) (AM. BAR ASS'N 2024).

46*.* ABA Comm. on Ethics & Pro. Resp., Formal Op. 472, at 3 (2015) (quoting D.C. Bar, Ethics Op. 330 (2005)).

47. MD. ATT'YS' RULES OF PROF. CONDUCT r. 1.2.

48. N.H. RULES OF PROF. CONDUCT r. 1.2(g)(1); D.C. Bar, Ethics Op. 330 (2005).

B. Ghostwriters: Limited Scope Representation Does Not Require Formal Appearance

Ghostwriting is a form of limited scope representation where an attorney drafts pleadings and briefs on behalf of a client but does not file a notice of appearance or otherwise disclose their contribution to the court.[49] Federal courts hold a negative opinion of the practice of ghostwriting, considering it unethical under state ethics rules or even a violation of Rule 11 of the Federal Rules of Civil Procedure.[50] This is because of the judicial liberal pleading interpretation for unrepresented litigants. Under the doctrine, a court will read pleadings broadly in favor of a party working without counsel who is unfamiliar with the law and legal procedure.[51] Some courts believe that pro se parties have an unfair advantage over those represented by counsel when they have an attorney operating in the shadows.[52] In *Klein v. Spear, Leeds & Kellogg*, the court observed that the legal ghostwriter

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49. Goldschmidt, *supra* note 10.

50. Jona Goldschmidt, *The Courts' Views on Ghostwriting Ethics Are Wildly Divergent. It's Time to Find Uniformity and Enhance Access to Justice*, 102 JUDICATURE 37, 38 (2018). One criticism of Rule 11 is that it only applies to signatories of pleadings. *Id.* Rule 11 provides, in part:

> (a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name—or by a party personally if the party is unrepresented. . . .
> (b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:
> > (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
> > (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
> > (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
> > (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

FED. R. CIV. P. 11.

51. Erickson v. Pardus, 551 U.S. 89, 94 (2007).

52. Goldschmidt, *supra* note 10, at 1152–53; *see also* Klein v. H.N. Whitney, Goadby & Co., 341 F. Supp. 699, 702 (S.D.N.Y. 1971) (stating that ghostwriting is "grossly unfair to both this court and the opposing lawyers and should not be countenanced").

deprived it and opposing counsel of the knowledge of their identity.[53] The court opined about the necessity of "dealing in the open," and admonished that "unrevealed support in the background enables an attorney to launch an attack, even against another member of the Bar . . . without showing his face."[54] Notwithstanding the views of the courts, the ABA and many state bar ethics committees approve of legal ghostwriting.[55] As Jona Goldschmidt writes, ghostwriting "gives the pro se plaintiff a fighting chance at justice."[56] The ABA has given its imprimatur to ghostwriting, allowing that "[a] lawyer may provide legal assistance to litigants appearing before tribunals 'pro se' and help them prepare written submissions without disclosing or ensuring the disclosure of the nature or extent of such assistance."[57] The ABA concedes ghostwriting as "a form of 'unbundling' of legal services, whereby a lawyer performs only specific, limited tasks instead of handling all aspects of a matter."[58] The ethics committee took the position that not disclosing to the court the presence of shadow counsel lurking behind the scenes is not dishonest.[59] They reasoned that "the fact that a litigant submitting papers to a tribunal on a pro se basis has received legal assistance behind the scenes is not material to the merits of the litigation" and "will not secure unwarranted 'special treatment' for that litigant."[60] The self-represented litigant will not receive special treatment because "if the undisclosed lawyer has provided effective assistance, the fact that a lawyer was involved will [naturally] be evident to the tribunal. If the assistance has been ineffective, the pro se litigant will not have secured an unfair advantage."[61] The ABA is not

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53. 309 F. Supp. 341, 342 (S.D.N.Y. 1970).

54. *Id.* at 342–43.

55. Goldschmidt, *supra* note 50, at 40.

56*. Id.* at 43.

57. ABA Comm. on Ethics & Pro. Resp., Formal Op. 07-446, at 1 (2007) (discussing undisclosed legal assistance to pro se litigants).

58*. Id.*

59. *Id.* at 3–4.

60*. Id.* at 2–3.

61. *Id.* at 3.

alone in its view. The D.C. Bar likewise does not require a limited scope attorney to file a notice of appearance in court.[62]

C. Legal Outsourcing to Foreign Lawyers and Law Firms

Like they blessed limited scope representation, the ABA has blessed another cost savings measure that involves outsourcing substantive legal work to less expensive foreign law firms.[63] In this situation, the lawyer oversees the work of the foreign law firm and approves the ultimate work product, which is analogous to outsourcing substantive legal research and drafting to an AI chatbot.[64] The outsourcing attorney must take reasonable steps to ensure that the outsourced lawyers comply with standards of professional conduct, but "[t]he lack of rigorous training or effective lawyer discipline does not mean that individuals from [another] nation cannot be engaged to work on a particular project."[65] ABA Formal Opinion 08-451 only limits outsourcing to the extent that the lawyer is prohibited from using it in furtherance of the unauthorized practice of law.[66] Otherwise, "[t]here is nothing unethical about a lawyer outsourcing legal . . . services" so long as they comply with Rule 1.1.[67]

Solo practitioners and small- to medium-sized law firms can leverage the experience and similar legal education of foreign lawyers to research and write substantive motions and other legal work product. The ABA recognizes this as an outgrowth of "our globalized economy" that promotes access to justice by lowering fees, thereby making legal representation more affordable.[68] As with limited scope representation, it is recommended that the outsourcing attorney obtain

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62. D.C. Bar, Ethics Op. 330 (2005).

63. ABA Comm. on Ethics & Pro. Resp., Formal Op. 08-451, at 1 (2008).

64. *Id.* at 1, 3.

65*. Id.* at 4.

66*. Id.* at 1.

67*. Id.* at 2 (citing Rule 1.1 requirement that a lawyer maintain the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").

68*. See id.*

the informed consent of the client before engaging the services of a foreign law firm.[69]

Outsourcing to foreign lawyers or law firms adds layers of scrutiny to the supervising attorney or firm. The outsourcing lawyer must review the adequacy of the foreign jurisdiction to account for success if a dispute arises from the services.[70] The lawyer must assess the likelihood of inadvertent disclosures of confidential and proprietary information and the difficulty of conducting conflict checks with the foreign law firm.[71] The foreign law firm may be offering their services to a competitor. GenAI offers the economic benefits of lowering costs that outsourced foreign lawyers provide but without some of these concerns.

II. THE ERRONEOUS CONTROVERSY OVER GENAI

As with limited scope representation, courts frown upon the use of GenAI, specifically ChatGPT. On May 30, 2023, Judge Brantley Starr of the United States District Court for the Northern District of Texas issued a standing order in his court regarding the use of GenAI.[72] Other judges are following this approach[73] because ChatGPT, by writing according to specialized data sets, will "hallucinate."[74] In other words, GenAI will create its own case citations or cite to completely irrelevant

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69. ABA Comm. on Ethics & Prof. Resp., Formal Op. 08-451, at 4 (2008) (specifically citing Rules 7.1 for "truthfulness in communications" and 8.4(c) for "prohibiting dishonesty").

70. *Id.* at 3–4.

71. *Id.* at 3, 5.

72. Grossman et al., *supra* note 3, at 70. Judge Starr requires:

> All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being . . . [because] [t]hese platforms in their current states are prone to hallucinations and bias.

Judge Brantley Starr – Judge Specific Requirements: Mandatory Certification Regarding Generative Artificial Intelligence, U.S. DIST. CT. N.D. TEX., https://www.txnd.uscourts.gov/judge/judge-brantley-starr [https://perma.cc/G9GX-2PNB].

73. Grossman et al., *supra* note 3, at 70–71.

74. *Id.* at 71, 73.

cases, which has occurred in some courts where attorneys have used ChatGPT to write their briefs.[75]

The first high-profile case to serve as a caveat against using ChatGPT in formal legal research and writing occurred in a New York court. A passenger brought suit against Avianca Airlines after the food and beverage cart hit his knee on a flight to New York.[76] His attorneys submitted a ten-page brief in the case that relied on ChatGPT for legal research.[77] The attorneys ended up citing completely made-up cases, including "Martinez v. Delta Air Lines," "Zicherman v. Korean Air Lines," and "Varghese v. China Southern Airlines."[78] The judge could not find citations to any of these cases.[79] The attorney who wrote the brief told the judge in a subsequent sanctions hearing that he "did not comprehend that ChatGPT could fabricate cases."[80] The court ultimately sanctioned the attorneys whose names were on the brief.[81]

The Texas Court of Appeals in Waco also considered a brief filed with erroneous citations generated by AI.[82] The court found the briefing "illogical."[83] Unlike *Avianca, Inc.*, this one involved a pro se litigant evidently using AI to prepare a habeas corpus petition.[84] Regarding the Argument section of the brief, the court pointed out that "[n]one of the three published cases cited actually exist in the Southwest Reporter."[85] Because of the inadequacy of the brief, the court denied the defendant's petition.[86]

More recently, President Donald Trump's former attorney, Michael Cohen, ran into similar problems with a brief filed in federal court.

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75. *Id.* at 71.

76. Mata v. Avianca, Inc., No. 22-cv-1461 (PKC), 2023 WL 4114965, at *2 (S.D.N.Y June 22, 2023).

77. *Id.* at *3; Weiser, *supra* note 4.

78. Weiser, *supra* note 4.

79. *Id.*

80. Benjamin Weiser & Nate Schweber, *The ChatGPT Lawyer Explains Himself*, N.Y. Times (June 8, 2023), https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html.

81. *Mata*, 2023 WL 4114965, at *16.

82. Lauren Berg, *Texas Appeals Court Calls Out Seemingly AI-Generated Cites*, Law360 (July 26, 2023, 9:38 PM), https://www.law360.com/pulse/articles/1704217/texas-appeals-court-calls-out-seemingly-ai-generated-cites [https://perma.cc/BYW9-39MZ].

83. *Id.*

84. *Id.*; *Ex parte* Lee, 673 S.W.3d 755, 756 (Tex. App. 2023).

85. *Ex parte Lee*, 673 S.W.3d at 756.

86. *Id.* at 757.

Michael Cohen informed the court that he had used online GenAI tool Google Bard to conduct legal research in support of the court filing for an early release related to the COVID-19 pandemic.[87] Google Bard, like ChatGPT, provided made-up case citations.[88] Unbeknownst to Cohen, his attorney relied upon the Google Bard cites when preparing the filing.[89] Cohen's attorney had not checked the citations for accuracy.[90]

The problem with using GenAI—like ChatGPT or Google Bard—for writing legal briefs is that it is not programmed for that purpose. GenAI is programmed to respond to prompts in a conversational tone.[91] GenAI programs are fed large amounts of data that the system analyzes for patterns to predict future responses.[92] In this way a chatbot, for example, can mimic a human-like conversation.[93] AI is not limited to conversations, questions, and answers. AI systems can analyze large data sets to produce written work products like blog posts, essays, and articles mimicking different writing styles.[94]

ChatGPT is one form of AI chatbot that has gained notoriety in the courts and legal community. It "uses natural language processing to create humanlike conversational dialogue," and can "compose various written content."[95] GPT is short for "Generative Pre-trained

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87. Benjamin Weiser & Jonah E. Bromwich, *Michael Cohen Used Artificial Intelligence in Feeding Lawyer Bogus Cases*, N.Y. TIMES (Dec. 29, 2023), https://www.nytimes.com/2023/12/29/nyregion/michael-cohen-ai-fake-cases.html [https://perma.cc/CH85-R55V]; Paula Reid, *Michael Cohen to Be Released from Prison for Home Confinement Due to Fears of Coronavirus Spread*, CBS NEWS (Apr. 17, 2020, 2:43 PM), https://www.cbsnews.com/news/michael-cohen-prison-release-coronavirus/ [https://perma.cc/V9T9-F4FZ].

88. Weiser & Bromwich, *supra* note 87.

89. *Id.*

90. *Id.*

91. Amanda Hetler, *ChatGPT*, TECHTARGET, https://www.techtarget.com/whatis/definition/ChatGPT#:~:text=ChatGPT%20is%20an%20artificial%20intelligence,%2C%20essays%2C%20code%20and%20emails [https://perma.cc/45UE-BMY8] (Dec. 2023); *Introducing ChatGPT*, OPENAI: BLOG (Nov. 30, 2022), https://openai.com/blog/chatgpt [https://perma.cc/8AG2-ZHH5].

92. Laskowski, *supra* note 1.

93. *Id.*

94. *See id.*

95. Hetler, *supra* note 91.

Transformer."[96] GPT uses algorithms to process generic sets of data first, then more specialized data, then user rankings for the best answer.[97] GPT programming evolves with feedback from its human users.[98] GPT-4 (fourth generation) can provide an answer of up to 25,000 words in response to a user prompt.[99] GPT-4 uses "deep learning . . . to produce humanlike text through transformer neural networks," which predict text.[100] In other words, for the purpose of this analysis, ChatGPT is able to provide a written work product up to 25,000 words—essentially the length of a substantial legal brief in a case.

ChatGPT, however, is in its infancy. It will write a response that appears correct but really has many errors or false information. This is not easy to correct. One of the challenges is that "during RL training, there's currently no source of truth."[101] Additionally, "training the model to be more cautious causes it to decline questions that it can answer correctly," and "supervised training misleads the model because the ideal answer depends on what the model knows, rather than what the human demonstrator knows."[102]

The way questions are phrased to ChatGPT may affect the answer. Worded one way, ChatGPT may not know the answer, but asked another way, it may provide the correct answer.[103] Importantly, regarding its misuse as a tool for legal research, ChatGPT does not ask clarifying questions. Instead, it makes a guess as to what the user is asking.[104]

Courts are overreacting by making it taboo for attorneys to use any AI when preparing a legal filing. As discussed earlier, Westlaw Precision and Lexis+ AI are explicitly programmed for fast legal research supported by accurate pincites to real cases. Attorneys should

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96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Introducing ChatGPT*, *supra* note 91.
102. *Id.*
103. *Id.*
104. *Id.*

now, however, know better than to use a nonlegal GenAI tool to prepare a filing. Pro se litigants should still receive guidance on the misuse of ChatGPT or similar GenAI in preparing court filings.

III. GenAI Leading to Corporatized Legal Services for Lower and Middle-Income Clients

AI, by its fact-pattern-specific nature, likely constitutes the unauthorized practice of law, but it is ideally suited for limited scope representation. As discussed, limited scope representation allows an attorney to conduct legal research and write briefs on behalf of a client without making a formal notice of appearance before the court or an administrative forum.[105] While the courts dislike this practice, the ABA finds the practice consistent with attorney ethics.[106] By removing the requirement of a notice of appearance, as with limited scope representation and outsourcing, an attorney may instead use law-specific GenAI to draft fast, accurate briefings that a client can file on their own behalf in court. This will lead to lower costs, but it will also establish the basis for market consolidation.

Consolidation of the legal market for low- and middle-income clients may look like TurboTax, which offers tax preparation software at a more affordable price compared with employing an accounting firm.[107] TurboTax not only sells the software and the tools to support online filing with the IRS and state tax authorities but also provides real-time advice from licensed CPAs for a subscription fee.[108] The TurboTax subscriber ("client") can meet with the accountant online via virtual chat.[109]

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105. *See supra* Section I.A.

106. Goldschmidt, *supra* note 10, at 1163, 1166; Goldschmidt, *supra* note 50, at 40.

107. *See Frequently Asked Questions*, TURBOTAX, https://turbotax.intuit.com/best-tax-software/common-questions/ [https://perma.cc/Q698-A7TE]; *see also* Gennaro Cuofano, *How Does TurboTax Make Money?*, FOURWEEKMBA (Nov. 6, 2023), https://fourweekmba.com/how-does-turbotax-make-money/ [https://perma.cc/U8Y3-ZMMD].

108. *See* sources cited *supra* note 107.

109. *See* sources cited *supra* note 107.

Without AI, law firms and solo practices leverage the internet to connect with potential clients and provide advice through virtual chat rooms. A legal conglomerate composed of attorneys, both full-time and contractual, can offer AI software for clients to input specific data that will research, write, and pinpoint cite legal briefs. AI can also draft legal instruments like deeds, wills, and trusts. Assuming an accurate, efficient AI, programmed to be legal-specific, one attorney could oversee a large number of legal matters and be available for online chats with clients. TurboLaw would, thus, be compliant with legal ethics requirements while providing greater access to justice and more affordable legal representation generally.

A. *AI May Constitute the Unauthorized Practice of Law*

On its face, AI on its own constitutes the practice of law. A public online AI tool that can answer legal questions and draft court filings, similar to ChatGPT, would run afoul of state prohibitions on the unauthorized practice of law (UPL).[110] A legal AI chat tool is analogous to legal form books. Legal form books generally, with notable exceptions, do not constitute the practice of law for UPL purposes.[111] In a seminal case, the New York Court of Appeals held that legal form books are not legal practice because there is no relationship between the publisher and the reader, and the form books provide no tailored legal advice for specific problems.[112] Indeed, the Dacey court, following Judge Stevens's dissent from the lower court, observed that a form book merely states "what the law is."[113] The court concluded:

> [T]he mere fact that the principles or rules stated in the text
> may be accepted by a particular reader as a solution to his

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110. *See Introducing ChatGPT*, *supra* note 91; Hetler, *supra* note 91; *see, e.g.*, MODEL RULES OF PRO. CONDUCT r. 5.5 (AM. BAR ASS'N 2024).

111. *See, e.g.*, Utah State Bar Ethics Advisory Op. Comm., Op. 95-01 (1995).

112. *In re* N.Y. Cnty. Laws.' Ass'n, 234 N.E.2d 459, 459 (N.Y. 1967); *see also* State Bar of Mich. v. Cramer, 249 N.W.2d 1, 8–9 (Mich. 1976).

113. *In re N.Y. Cnty. Laws.' Ass'n*, 234 S.E.2d at 459.

problem, does not affect the matter, and that the publication of a multitude of forms for all manner of legal situations is a commonplace activity and their use by the Bar and public is general, and that the conjoining of text and the forms with advice as to how the forms should be filled out does not constitute the unlawful practice of law . . . .[114]

Similar to New York, Texas does not consider form books, software, or similar items that are "clearly and conspicuously" labeled "not a substitute for the advice of an attorney" as UPL,[115] but form books for wills are considered the practice of law.[116] Texas, however, does prohibit nonlawyers from preparing any legal documents related to real property.[117] Texas also does not allow nonlawyers to write briefs or provide legal advice.[118] Texas courts have also restricted nonlawyers from drafting mechanics' lien affidavits or demand letters on behalf of third parties.[119]

The scope and breadth of individual jurisdictions' regulations of legal practice pose obstacles to publicly available legal AI chatbots. Generally, a legal information specific AI chatbot would not conform with Davey's views on the limitations of form books. Unlike a simple form book, AI would not be providing its users with a statement of what the law is but would be proposing answers to specific problems and fact patterns. AI could also go beyond forms and write legal briefs and pleadings. Finally, in Texas for example, AI drafting of legal documents related to real property would be outright prohibited.[120] AI, however, could provide these same legal services, consistent with the

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114. *Id.*

115. TEX. GOV'T CODE ANN. § 81.101(c) (Westlaw through Reg., 2d, 3d, and 4th Called Sess. of 88th Legis., and the Nov. 7, 2023 election).

116. Fadia v. Unauthorized Prac. of L. Comm., 830 S.W.2d 162, 165 (Tex. App. 1992).

117. TEX. GOV'T CODE ANN. § 83.001(a) (Westlaw through Reg., 2d, 3d, and 4th Called Sess. of 88th Legis., and the Nov. 7, 2023 election).

118. § 81.101(a).

119. Crain v. Unauthorized Prac. of L. Comm., 11 S.W.3d 328, 333 (Tex. App. 1999); Green v. Unauthorized Prac. of L. Comm., 883 S.W.2d 293, 298 (Tex. App. 1994).

120. *See* § 83.001(a).

Bar's promotion of access-to-justice measures, in combination with contract attorneys.[121]

B.   Online Legal Practice Innovations Already in Place for AI

The stage has been set by ethics opinions and innovations in law practice for GenAI to play a substantial role in providing legal services to those that would otherwise represent themselves. Lawyers are already allowed to leverage existing platforms to chat online with prospective clients.[122] The D.C. Bar, for example, recognizes that the "cyberspace communications revolution" permits attorneys to communicate with the public through online chat rooms, list servs, and similar forms of communication.[123] A number of websites offer free or user fee direct communications with a licensed attorney with applicable disclaimers that the attorneys are not providing legal advice.[124] Some attorneys in these situations provide direct contact details to establish an attorney-client relationship offline.[125] The D.C. Bar cites "Free Advice" and "Dads' Divorce" as websites offering direct communications with licensed attorneys.[126] When answering legal questions in an online chat room, the attorney should avoid giving specific advice that could create an attorney-client relationship and trigger D.C. ethics rules compliance.[127] The D.C. Bar cautions that the "most distinctive characteristic[] of cyberspace communications" is that they are worldwide, implicating ethical issues across multiple jurisdictions.[128]

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121.   TASKFORCE FOR RESPONSIBLE AI IN THE LAW, INTERIM REPORT TO THE STATE BAR OF TEXAS BOARD OF DIRECTORS 8–9, 17–18.

122.   D.C. Bar, Ethics Op. 316 (2002).

123*. Id.*

124*. Id.*

125.   Id.

126*. Id.*

127.   Id.

128.   D.C. Bar, Ethics Op. 316 (2002).

C. *Virtual Practice*

Consistent with the evolution of legal practice from the growth of the internet to the global COVID-19 pandemic, the ABA recognizes and provides guidance on practicing law in a wholly virtual environment.[129] A virtual law practice is one that is "technologically enabled . . . beyond the traditional brick-and-mortar law firm."[130] The ABA Model Rules do not require lawyers to practice in a physical brick-and-mortar environment.[131] When working in a completely virtual environment, lawyers must still comply with the Model Rules of Ethical Conduct "especially when using technology."[132] A comment on Model Rule 1.1 instructs lawyers to keep abreast of updates in legal practice "*including the benefits and risks associated with relevant technology.*"[133]

The heavy reliance on technology that comes with practicing in a virtual environment raises concerns related to the disclosure of confidential information.[134] The lawyer must take reasonable measures when transmitting information over the internet. The attorney is not required to use "special security measures" where there exists "a reasonable expectation of privacy."[135] Attorneys are, however, encouraged to use secure Wi-Fi, Virtual Private Networks, unique and complex passwords, firewalls, cybersecurity software, encryption, and multifactor authentication to mitigate the risk of inadvertent disclosure of confidential information.[136] When using software, the attorney is only required to "carefully review[] the terms of service . . . to assess

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129. ABA Comm. on Ethics and Pro. Resp., Formal Op. 498, at 1 (2021) ("[T]his opinion does not address every ethical issue arising in the virtual practice context.").

130. *Id.*

131. *See id.*

132. *Id.*

133. *Id.*

134. *See id.*

135. ABA Comm. on Ethics and Pro. Resp., Formal Op. 498, at 3 (2021) (quoting MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 19 (AM. BAR ASS'N 1983)); *id.* ("A lawyer generally may transmit information relating to the representation of a client over the Internet . . . where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access." (quoting ABA Comm. On Ethics and Pro. Resp., Formal Op. 477R (2017))).

136. *Id.* at 4.

whether confidentiality is protected."[137] Counsel merely "must ensure that all [vendors] comply with the lawyer's obligation of confidentiality and other ethical duties."[138]

D. Limited Scope Representation Rules Mean AI Can Be Supported by Contract Attorneys

Consistent with state prohibitions on the unauthorized practice of law, contract attorneys, who currently conduct document review and e-discovery, can leverage AI to provide limited scope representation or unbundled legal services consistent with ABA and state ethics rules. Contract attorneys are hired on a temporary basis, generally to review documents for relevancy and privileged information in discovery requests.[139] Working as a contract attorney has been described as "soul sucking, depression-inducing misery."[140] Contract attorneys have been known to be mistreated, with now infamous accounts of "lawyers having to sign out of the office to use bathrooms that are cleaned only twice per week," if that.[141]

Contract lawyers, however, have seen the utilization of their services grow. Smaller firms and solo practitioners now rely on them for substantive legal work.[142] It is a cost-effective way of managing personnel with fluctuating workloads. As contract attorneys take on more substantive work, they are well suited to use AI tools to manage a large number of cases and clients. Contract attorneys provide flexibility based on a fluctuating workload from a startup legal services company. Importantly, they satisfy the ethics requirements and avoid the unauthorized practice of law that AI faces.

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137. *Id.*

138. *Id.* at 7.

139. Steven Chung, *Contract Attorneys: They're Doing More Than Just Doc Review*, ABOVE THE L. (Oct. 25, 2017, 1:06 PM), https://abovethelaw.com/2017/10/contract-attorneys-theyre-doing-more-than-just-doc-review/ [https://perma.cc/AJS9-GVZP].

140. *Id.*

141. *Id.*

142. *Id.*

CONCLUSION

GenAI technology is off to a rough start with the judiciary. High-profile misfires have led to overreactions by some judges to attempt to curb the use of GenAI in the preparation of legal filings. While using readily available tools like ChatGPT and Google Bard that are not intended for legal research should be discouraged, legal-specific alternatives will improve efficiency by using fast legal research supported with pinpoint citations. Legal-specific GenAI will also transform the market for legal services.

Innovations in the provision of legal services like limited scope representation and ghostwriting do not require formal appearances in court and establish a groundwork for market consolidation around the use of AI. When used on its own by a pro se litigant, AI may be viewed as the unauthorized practice of law because it provides legal information for a specific legal problem. AI, however, can be used by a lawyer or law firm as part of a limited scope agreement in which the lawyer will oversee the AI work product at a substantially lower cost. This will lead to consolidation; large companies can hire contract attorneys to oversee the GenAI, and the company can provide the final work product to the client. A lower cost, economy-of-scale model can provide legal services—like TurboTax provides tax preparation services—to lower and middle-income individuals and families. As with many industries in the internet age, this may ultimately lead to increased competition that may hinder solo practice and smaller law firms.