

Davis Polk

How generative AI is impacting the legal industry

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Basic terminology

- **Artificial Intelligence (AI)** can be generally defined at a high level as *the use of digital technology to create systems capable of performing tasks commonly thought to require intelligence*
- **Generative AI (GenAI)** is a broad category of AI models that focuses on the creation of content.
 - These types of tools, broadly speaking, respond to “inputs” from users (i.e., questions or instructions) by providing an “output” that is uniquely generated by the tool in response to the input, rather than being preformulated
 - To “learn” how to generate outputs, GenAI tools are trained on large data sets to recognize the patterns and structures within that data
 - GenAI tools can be developed to create many different types of content
For example: text, images, video, software, music
- New laws and regulations may seek to encompass all of these concepts. For example, EU AI Act uses the following broad definition of “**AI System**”:
A machine-based system designed to operate with varying levels of autonomy and that may exhibit adaptiveness after deployment and that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments

Basic terminology (cont.)

- **Large Language Models** (“LLMs”) are a sub-category within GenAI. They are specifically designed to take in textual inputs and generate textual responses
 - In other words, an LLM will write a poem in the style of Shakespeare, but will not create a picture of a dog riding a tricycle
 - LLMs are complex systems, but they are not sentient
 - Essentially, all an LLM is programmed to do is to utilize a set of devised rules to *predict* what the “best” next word in a string of words should be
 - When an LLM generates an output, it is just making predictions about the next word, over and over again, one word at a time
 - Because LLMs do not engage with the question of whether outputs are true or not, they are prone to ***hallucinations***, which is the term used when LLMs provide an incorrect answer (with no indication that it might be incorrect)

Basic terminology (cont.)

- **GPT-4 and GPT-4o** are examples of LLMs
 - Both were created by a company called OpenAI and trained on diverse internet text up through a certain date
 - GPT-4o was trained on data up through October 2023
- **ChatGPT** is a specific software program that is powered by one of the GPT models. The program is designed to seem like a “chat” (meaning, designed to be conversational with respect to inputs and outputs)
 - It is not the only LLM chat program that is commercially available: there are also systems like Gemini (developed by Google) and Claude (developed by Anthropic), among many others
 - Each system is powered by a different model, some of which are proprietary and some of which are open source
 - The current version of ChatGPT enhances its LLM by integrating additional features
 - DALL-E 3, a GenAI image model, generates images from a text prompt
 - GPT Search allows the tool to retrieve real-time internet information and incorporate it into responses

Current state of the GenAI legal market

- We are still in the early days of LLM technology, which has largely been successful with respect to foundational document review and analysis
- Proliferation of legal startups:
 - Harvey: has an “Assistant” AI tool that drafts, analyzes and answers questions
 - Clearbrief: utilizes AI to find and organize facts in litigation/discovery
 - Deep Judge: GenAI-powered search
 - Hebbia: a platform to review and analyze large document sets
 - This list is illustrative only; new GenAI legal tools are being brought to market on a regular basis
- Integrations into industry-standard legal tools are now common:
 - Westlaw Precision and Practical Law
 - Lexis+ AI
 - Bloomberg Law
- Integrations into general-purpose tools are also becoming common, such as iOS version 18.1 with Apple Intelligence

Current state of the GenAI legal market (cont.)

- Companies and firms can also build branded chat functionality and basic apps using various platforms, such as Microsoft Azure's instance of GPT-4o from OpenAI
 - Not an on-prem solution, but allows a business to use its own Microsoft Azure instance for added control
 - For many businesses, there is increased comfort in Microsoft's security claims as compared to those made by startups
 - Potentially more comfort with promises that the LLM is not being trained on inputs, etc.
 - Microsoft allows businesses to apply to opt-out of its abuse monitoring program
 - LLMs are skilled at working with language. Thus, examples of potential functionality include:
 - Uploading a document and having the AI summarize it
 - Providing text in another language and having the AI translate it
 - Uploading multiple documents and asking questions about them
 - With legal integrations, tools may also be able to perform tasks in other systems
 - For example, asking a chatbot to create a time entry in your billing system

Current state of the GenAI legal market (cont.)

- However, many law firms are not adopting the technologies for client work due to confidentiality and other ethics concerns, as well as detailed and varied client prohibitions on use
 - Key concerns that clients face include:
 - **Confidentiality:** Will client data and sensitive information remain confidential and will privilege remain intact?
 - **Data security:** Is the GenAI tool and the client data contained within it adequately protected from cyber threats?
 - **Human oversight:** Will attorneys review AI-generated outputs with the same critical thought and attention to detail traditionally applied to work product?
 - **Sufficient transparency:** Will clients know when and how firms are using GenAI tools on client matters?
 - What about the issues that lawyers have to contend with?

AI ethics updates for attorneys

- In July 2024, the ABA released Formal Opinion 512 on Generative Artificial Intelligence Tools
 - This formal opinion joins recent opinions and guidance from state and city bar associations, including guidelines for utilizing GenAI from the State Bar of California and a formal opinion from the Professional Ethics Committee of the New York City Bar
- The **duty of competence** includes a duty of “technological competence” (Model Rule 1.1, comment 8)
 - Attorneys must understand, to some reasonable extent, how the AI underlying a given tool works, as well as its strengths and limitations
 - Outputs must be critically reviewed
 - GenAI outputs are not considered a substitute for the legal skill or judgment required by the duty of competence

AI ethics updates for attorneys (*cont.*)

- The **duty of confidentiality** is clearly impacted
 - Lawyers must ensure that any GenAI solution that will be provided client confidential information meets appropriate security, confidentiality and data retention requirements
 - Could require coordination with information technology and information security teams
 - The ABA's Formal Opinion 512 on GenAI says that a client's informed consent is required before putting information related to the representation into a "self-learning" GenAI tool
 - "Self learning" tools are tools where information relating to one client's matter is input into the tool and the tool "learns" based on that material such that it could later reveal such information in outputs to lawyers working on other matters
 - At times, the guidance can be unclear because the technology is complicated. For example, the NYCBA's opinion says that "[w]ithout client consent, a lawyer must not input confidential client information into any Generative AI system that will share the inputted confidential information with third parties"
 - "Sharing with third parties" is written using plain language and does not provide any technical guidance on what types of LLMs are considered to be sharing information with third parties

AI ethics updates for attorneys (*cont.*)

- The **duty to supervise** lawyers and non-lawyers is also impacted by GenAI
 - Model Rule 5.1 has been interpreted in the context of GenAI to mean that managerial lawyers must establish policies regarding GenAI use and supervisory lawyers must make reasonable efforts to ensure that the policies are complied with
 - The supervisory obligation may require training, so it is probably prudent to provide training before granting access to a GenAI-based tool
- According to a number of ethics opinions, the responsibilities of subordinate lawyers now includes a requirement that a junior attorney refrain from using GenAI in a manner that would violate the junior attorney's professional responsibility obligations, even if instructed to do so by a senior attorney
 - May require a culture shift that empowers junior attorneys to make their own decisions about the appropriateness of GenAI use in each situation

Short-to-medium term expectations

- Nevertheless, the expectation is that barriers to entry will begin to be overcome, which will allow for a wider adoption of GenAI tools within law firms and legal departments
 - The industry will hopefully coalesce around standards for ethical usage of these tools
 - At the moment, rapidly evolving standards of practice and legal ethics requirements create risk for attorneys attempting to leverage GenAI for legal practice, but the rate of change is expected to slow as the tools become more widely accepted
- Increased integration with existing legal products:
 - GenAI functionality will increasingly be integrated into existing legal products and attorneys will choose to, or will be forced to, upgrade software to versions that are enhanced with GenAI
 - It will become more difficult to “quarantine” GenAI use as it becomes more integrated, even for attorneys (or clients) who have concerns about utilizing the functionality
 - The iOS 18.1 release for iPhones is a good example of this issue
 - Software costs for lawyers are expected to increase to account for the expense of supporting LLMs and GenAI platforms

Short-to-medium term expectations (*cont.*)

- General purpose (not legal-specific) software will likely have some of the most advanced functionality because of the investment that large corporations can make in developments and integrations
 - The Microsoft suite of products, including Outlook, Word, PowerPoint, etc.
 - iOS products, such as iPhones
- Models will get smaller
 - Small language models (SLMs) have been released this year by many major players:
 - Microsoft's Phi-3-mini
 - OpenAI's GPT-4o mini
 - Google's Gemma
 - Meta's MobileLLM
 - May eventually lead to lower computing/technology costs
 - However, it's not always possible to use a smaller model. At the moment, they perform best on simpler, slower tasks, so large models are likely to remain popular for complex legal work
 - Might allow firms to host models on-prem

Longer-term expectations

- Will likely see increased specialization within smaller language models
 - A small model that is fine-tuned for legal work may actually be more helpful/accurate than a general-purpose LLM
- Increased capacity for consumer fine-tuning
 - May see the ability to take an LLM or SLM and further fine-tune it on information proprietary to a specific law firm or company
 - This would be actual fine-tuning at the model training level (not the same as Retrieval Augmented Generation, which just restricts where the output information can come from)
 - However, this approach would need to solve for self-learning tools and ensure that confidentiality obligations are met and ethical walls remain intact
 - Would lead to higher quality outputs
- Evolution of staffing and pricing models
 - May see an increase in value-based billing
 - Roles and responsibilities of attorneys may begin to change (more of a hybrid profession that combines technology use with legal acumen)

Attorney training and development

- The industry could see skills gaps in the short term related to AI usage
 - The new skills required to utilize GenAI effectively will require additional training:
 - Prompt engineering
 - How to select the correct tool for a given task
 - Sufficient knowledge of the tools to obtain informed consent from clients, if applicable
 - We are already seeing law schools begin to include GenAI in the legal curriculum
 - An ABA study of US law schools from June 2024 found that 55% of responding schools offer classes specifically designed to teach students about AI
- The industry could see skills gaps in the long term related to legal knowledge and capabilities
 - In some areas, GenAI could reduce or eliminate certain types of foundational junior associate work, requiring firms to develop other ways to train associates
- It is expected that training will be required before attorneys may receive access to GenAI tools

Talking to your lawyers about GenAI usage

- Clients and law firms should engage in an open, constructive dialogue about an approach that will strike a balance between a client's concerns and a firm's need to provide legal services using modern technology
 - In addition to discussions about specific technology, clients should consider whether they would be willing to review and sign off on a law firm's GenAI due diligence process and governing principles
 - An agreed-upon process guiding the security review and adoption of a specific GenAI technology may facilitate any subsequent discussions or consent procedures between lawyers and clients
- Remember that not all AI is the same
 - Machine learning capabilities have been in use at law firms for years (e.g., Westlaw searches)
 - Public, third-party GenAI tools like ChatGPT have very different security postures than tools within a law firm's own Azure environment or tools included in Apple's iOS 18.1 release