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DIGITAL LAWYERING: ADVOCACY IN THE AGE OF AI

*Patrick Barry**

Introduction

All lawyers are now digital lawyers. From Zoom hearings, to e-discovery, to AI-enhanced research and writing, the practice of law increasingly requires the skillful navigation of a wide range of technological tools. It's no longer enough to be book smart and street smart. More and more, you also have to be byte-smart.

To help future lawyers navigate this transition, I recently created a course at both the University of Michigan Law School and the University of Chicago Law School called “Digital Lawyering: Advocacy in the Age of AI.” It takes a skill-building approach to artificial intelligence. Which tools are worth using? What questions are worth asking? And how do advocates of all kinds continue to add value to clients—and promote justice—in a world increasingly populated by chatbots, algorithms, and a wide range of other powerful digital products?

I. Deadlines and Duplicity

It was wonderful to be able to talk about the course at the “Law and Justice in the Age of AI” symposium helpfully organized by the *Michigan Technology Law Review* on November 18, 2023, especially because the other presenters

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and panelists did a great job filtering out the AI hype—both dystopian and utopian. The current state of the technology no longer strikes me as being as career-threatening as doomsayers fear. Nor does it seem as life-enhancing as tech-optimists claim. In the words of Wharton business professor Ethan Mollick, who has spent a lot of time integrating applications like ChatGPT into both the courses he teaches and his own daily work habits, a good way to approach the existing models of AI tools is to treat them as if they were “weird, somewhat alien interns.”¹ They’re very eager. They’re incredibly fast. And, unfortunately, they “sometimes lie to make you happy.”²

Mollick could have added that one of the strangest things about these alien interns is also one of the most promising: they are freakishly good at hitting deadlines. If you want a draft of a document by the end of the day, you’ll get a draft of the document by the end of the day. You’ll probably even get it once you finish typing your request. You won’t have to send any reminder emails. Nor will you have to handle a bunch of requests for a last-minute extension. AI tools frequently “hallucinate”—but they never procrastinate.

I used part of my own presentation time at the symposium to reflect on what it’s like to have access to such a dependably deadline-driven tool at our disposal, twenty-four hours a day, seven days a week, three-hundred and sixty-five days a year. The rest of this essay will try to capture (and refine) what I said.

First, though, it is important to acknowledge that (1) shoddy work that is delivered on time is still shoddy work and

¹ Ethan Mollick, *On-boarding your AI Intern*, ONE USEFUL THING, (May 20, 2023), [On-boarding your AI Intern - by Ethan Mollick \(oneusefulthing.org\)](https://oneusefulthing.org).

² *Id.*

(2) large language models in particular remain unsettlingly error-prone. They fabricate citations.³ They fabricate crimes.⁴ They fabricate so much that the Princeton computer scientist Arvind Narayanan and his PhD student Sayash Kapoor have called ChatGPT “the greatest bullshitter ever.”⁵ “We mean [‘bullshitter’] not in a normative sense but in a relatively precise sense,” Narayanan explained in a 2023 interview.⁶ “We mean that it is trained to produce plausible text. It is very good at being persuasive, but it’s not trained to produce true statements. It often produces true statements as a side effect of being plausible and persuasive, but that is not the goal.”⁷

Humans, of course, are also notoriously good bullshitters.⁸

³ For a summary of examples, see Mukesh Kumar et al., *Artificial Hallucinations by Google Bard: Think Before You Leap*, NAT’L. LIBR. OF MED. (Aug 10, 2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10492900/>; William H. Walters & Esther Isabelle Wilder, *Fabrication and errors in the bibliographic citations generated by ChatGPT*, NATURE (Sep. 7, 2023), <https://www.nature.com/articles/s41598-023-41032-5>; Ben Davis, *In the News: ChatGPT Goes Rogue, Fabricating Citations by Hal Foster and Carolyn Yerkes*, DEP’T OF ART & ARCHAEOLOGY (March 5, 2023), <https://artandarchaeology.princeton.edu/whats/news/news-chatgpt-goes-rogue-fabricating-citations-hal-foster-and-carolyn-yerkes>; Robin Emsley, *ChatGPT: these are not hallucinations-they’re fabrications and falsifications*, NATURE (Aug 19, 2023), <https://www.nature.com/articles/s41537-023-00379-4>.

⁴ See, e.g., Tiffany Hsu, *What Can You Do When A.I. Lies About You?*, N.Y. TIMES (Aug. 3, 2023), <https://www.nytimes.com/2023/08/03/business/media/ai-defamation-lies-accuracy.html?auth=login-googleItap&login=googleItap>; Pranshu Verma & Will Oremus, *ChatGPT invented a sexual harassment scandal and named a real law prof as the accused*, WASH. POST (April 5, 2023), https://www.washingtonpost.com/technology/2023/04/05/chatgpt-lies/?nid=top_pb_signin&arcId=BYBXDAEH5ZFUHICUHDXP44Y3BY&account_location=ONSITE_HEADER_ARTICLE.

⁵ Arvind Narayanan & Sayash Kapoor, *ChatGPT is a bullshit generator. But it can still be amazingly useful*, AI SNAKE OIL (Dec. 6, 2022), <https://www.aisnakeoil.com/p/chatgpt-is-a-bullshit-generator-but>.

⁶ Julia Angwin, *Decoding the Hype About AI*, THE MARKUP (Jan. 28, 2023), <https://themarkup.org/hello-world/2023/01/28/decoding-the-hype-about-ai>.

⁷ *Id.*

⁸ For interesting accounts of individual bullshitters, see FRANK W. ABAGNALE, *CATCH ME IF YOU CAN* (Mainstream Publ’g, 2003); RACHEL DELOACHE WILLIAMS, *MY FRIEND ANNA* (Gallery Books, 2019); and DIANA B. HENRIQUES, *THE WIZARD OF LIES* (St. Martin’s Griffin, Media tie-in ed. 2011). For a more wide-ranging look at multiple bullshitters, see DAVID MAURER, *THE BIG CON* (Anchor, First Anchor Books Ed. 1999) and TORI TELFER,

As the First Amendment expert Eugene Volokh noted on an artificial-intelligence-themed episode of the National Constitution Center’s “We the People” podcast, the tendency to “make stuff up and just blatantly make false statements without any shame and with maximum-seeming confidence”⁹ is a software glitch that can frequently be found in people as well. The acclaimed Spanish writer Juan Jacinto Muñoz-Rengel puts the point more bluntly in the first chapter of his book *The History of Lying*. “[T]he history of humankind,” he declares, “is nothing other than the history of making it up.”¹⁰

II. Control and Collaboration

It’s possible to see this propensity to prevaricate—or at least invent and imagine—as a positive feature (and not an annoying bug) of both human and artificial intelligence. Without it, the world might be a far less creative place. Here’s how Kevin Roose, whose book *Futureproof* offers a series of strategies for navigating a world of rapid technological change,¹¹ framed the issue in an interview with the CEO of OpenAI, Sam Altman:

Is there an optimal level of hallucination in an AI model? I’ve heard researchers say, well, you actually don’t want [the models] to never hallucinate, because that would mean making [them] not creative. New ideas come from making stuff up.¹²

CONFIDENT WOMEN (Harper Perennial, 2021)

⁹ Eugene Volokh, Lyrissa Lidsky, & Jeffrey Rosen, *Artificial Intelligence, Defamation, and New Speech Frontiers*, NAT’L CONST. CENTER (June 8, 2023), <https://constitutioncenter.org/news-debate/podcasts/artificial-intelligence-defamation-and-new-speech-frontiers>.

¹⁰ JUAN JACINTO MUÑOZ-RENGEL, *THE HISTORY OF LYING* 1 (Polity, 1st ed. 2022); *See also* JEREMY CAMPBELL, *THE LIAR’S TALE: A HISTORY OF FALSEHOOD* (W.W. Norton & Co., 1st ed. 2002)

¹¹ *FUTUREPROOF*, <https://www.kevinroose.com/futureproof>.

¹² Kevin Roose & Casey Newton, *Mayhem at OpenAI + Our Interview with Sam Altman*,

Altman agreed with the researchers. “If these models didn’t hallucinate at all, ever, they wouldn’t be so exciting,” he said. “They wouldn’t do a lot of the things they can do.”¹³ He also noted, though, that his company’s goal is to create models that give people greater control over when hallucinations occur. “You want it to be reliable when you want. You want it to— either you instruct it, or it just knows based off of the context, that you are asking a factual query, and you want the 100 percent black-and-white answer. But you also want it to know when you want it to hallucinate and you want it to make stuff up.”¹⁴

For Altman, the key issue is “controllability.”¹⁵ He wants to get to a point where individual users of ChatGPT can prevent hallucinations when they don’t want hallucinations and encourage hallucinations when they do want hallucinations.¹⁶

We’re not there yet. Hallucinations still occur too often and too unexpectedly for me to recommend that any lawyer or law student depend on LLMs or other generative AI tools for anything like reliable research or sound legal analysis.¹⁷ But that doesn’t mean that these tools can’t be useful collaborators, especially if the task you want assistance with needs to be completed quickly, needs to be written clearly, and is not very fact-intensive.

N.Y. TIMES (Nov. 20, 2023), <https://www.nytimes.com/2023/11/20/podcasts/mayhem-at-openai-our-interview-with-sam-altman.html?showTranscript=1>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See, eg, Hussam Alkaissi & Samy I McFarlane, *Artificial Hallucinations in ChatGPT: Implications in Scientific Writing*, NAT’L LIBR. OF MED. (Feb. 19, 2023), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9939079/>; Gina Kolata, *When Doctors Use a Chatbot to Improve Their Bedside Manner*, N.Y. TIMES (June 13, 2023), <https://www.nytimes.com/2023/06/12/health/doctors-chatgpt-artificial-intelligence.html>.

Consider, for example, a recent article in the *New York Times* about how doctors are using AI to improve their bedside manner. The article highlighted the role the chatbot ChatGPT played in helping a team in the department of internal medicine at the University of Texas-Austin create a script that could teach physicians to interact more compassionately with patients. “Doctors are famous for using language that is hard to understand or too advanced,” said one of the leaders of the team, Dr. Christopher Moriates.¹⁸ So he was particularly excited to see that the version of the script that ChatGPT generated—especially after being prompted to address someone who lacks medical expertise and only reads at a fifth-grade level—was helpfully free of jargon. It even, in Dr. Moriates’ view, came across as “more genuine”¹⁹ than what a typical doctor might produce.

But as remarkable as it is to learn that a piece of software is capable of communicating sincerity, an underappreciated part of the story is that even though everyone on the Texas medical team was asked to create a script, none of them actually did.²⁰ Whether because of too much work, too little sleep, or a combination of those and many other very human factors, the people specifically tasked with the assignment didn’t complete it. Only ChatGPT ultimately delivered.

That difference in dependability is, to me, one of the biggest potential benefits up teaming up with AI, and why taking a few hours in the next month to try out at least some of the tools now available —whether that be a chatbot like ChatGPT, a

¹⁸ Gina Kolata, *When Doctors Use a Chatbot to Improve Their Bedside Manner*, N.Y. TIMES (June 13, 2023), <https://www.nytimes.com/2023/06/12/health/doctors-chatgpt-artificial-intelligence.html>.

¹⁹ *Id.*

²⁰ *Id.*

text-to-image generator like Midjourney, or simply an AI-enhanced search engine like Perplexity AI—could be a very valuable investment. Imagine gaining a suite of coworkers (or, as Microsoft likes to say, “copilots”²¹) with the following extraordinary characteristics:

- They are immune to writer’s block and burnout.
- They don’t get distracted by social media (or anything, really).
- They won’t overcommit to a bunch of projects or in other ways stretch themselves too thin.
- They immediately respond to every one of your requests.
- They’re never in a bad mood.
- They always finish their work on time.

You can ask these coworkers to proofread documents. You can ask them to summarize reports. You can enlist them as sounding boards for virtually any idea you want to explore. They won’t judge you if you say something stupid. They won’t get impatient if you pepper them with a lot of follow-up questions. And they’ll happily give you feedback, in whatever style you want—drill sergeant, cheerleader, supportive boss, anxious client.

That doesn’t mean working with AI will be effortless or risk-free. Accuracy will be a concern. Privacy will be a concern. So will questions about bias, transparency, and attorney-client privilege. We already have one cautionary AI tale—the ChatGPT-produced brief in New York that was filled,

²¹ Yusuf Mehdi, *Announcing Microsoft Copilot, your everyday AI companion*, MICROSOFT (Sep. 21, 2023), <https://blogs.microsoft.com/blog/2023/09/21/announcing-microsoft-copilot-your-everyday-ai-companion/>.

unbeknownst to the lawyer who submitted it, with fictitious cases.²² Nobody wants to join that ignominious club.

At the same time, a policy of absolute avoidance comes with its own slate of potential downsides. “Law firms that effectively leverage emerging AI technologies will be able to offer services at lower cost, higher efficiency, and with higher odds of favorable outcomes in litigation,” writes John Villasenor, the co-director of the UCLA Institute for Technology, Law, and Policy.²³ “Law firms that fail to capitalize on the power of AI will be unable to remain cost-competitive, losing clients and undermining their ability to attract and retain talent.”²⁴

III. AI Starting Line

Villasenor’s essay, which was published by the Brookings Institute, is called “How AI Will Revolutionize the Practice Of Law.”²⁵ If you have been around long enough to see other tech predictions fizzle, you might be understandably skeptical that a wholesale transformation of the profession is imminent. As the Pulitzer Prize-winning journalist Steve Lohr recently observed, the AI-doomsayers got ahead of themselves when, more than a decade ago, they singled out lawyers as “an endangered occupational species.”²⁶ The number of lawyers in the United States has actually grown by 6.6% since 2012,

²² Erin Mulvaney, *Judge Sanctions Lawyers Who Filed Fake ChatGPT Legal Research*, WALL ST. J. (June 22, 2023), <https://www.wsj.com/articles/judge-sanctions-lawyers-who-filed-fake-chatgpt-legal-research-9ebad8f9>.

²³ John Villasenor, *How AI will revolutionize the practice of law*, BROOKINGS (Mar. 20, 2023), <https://www.brookings.edu/blog/techtank/2023/03/20/how-ai-will-revolutionize-the-practice-of-law/#:~:text=AI%20can%20be%20used%20to,be%20much%20faster%20with%20AI>.

²⁴ *Id*

²⁵ *Id*.

²⁶ 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>.

according to a study by the American Bar Association.²⁷ That's not a rapid expansion. But it's not an extinction-level event either. Attorneys still roam the earth.

Yet it would be naive to think that the tools of our trade and the nature of our work won't change as more and more of the world—and especially, more and more of our clients—explore the promise (and perils) of artificial intelligence. It would also be a missed opportunity. To lead. To grow. To evolve.

The transition process is bound to be bumpy, with lots of personal and professional missteps. But the nice thing about the current AI-moment is that there is still time for deliberate action. Although the first scientific paper on neural networks was published all the way back in 1943,²⁸ we're very much in the early stages of so-called "generative AI." No practicing lawyer is hopelessly behind. Neither is anyone commandingly ahead. We're all in an enviable spot: right at the starting line.

²⁷ ABA National Lawyer Population Survey: Lawyer Population by State (2022), https://www.americanbar.org/content/dam/aba/administrative/market_research/2022-national-lawyer-population-survey.pdf.

²⁸ Warren S. McCulloch & Walter Pitts, A logical calculus of the ideas immanent in nervous activity, SPRINGER LINK (Dec. 1943), <https://link.springer.com/article/10.1007/BF02478259>.