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LARGE LANGUAGE MODELS AND ETHICAL PITFALLS: TESTING THE LEGAL LIMITS OF “ROBOLAWYERING”

❖ Note ❖

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I. INTRODUCTION

Over the past several months, advanced machine learning algorithms called “large language models” (LLMs) have led to the creation of a variety of AI-powered legal software services.¹ LegalZoom leverages a simple LLM to interpret user responses to online questionnaires and generate boilerplate forms for estate planning and new business registration.² EU-based LegalAi uses the technology to provide prelitigation assessments of lawsuit validity to consumers.³ And Casetext provides document drafting and review for attorneys.⁴ But by far the buzziest and highest profile of these large language models is Open AI’s ChatGPT (short for “generative pre-trained transformer”). Launched in 2015, ChatGPT has rapidly become synonymous with LLMs, and many legal tech companies have already integrated ChatGPT into their platforms.⁵ Most recently, Casetext announced a contract with Am Law 20 firm DLA Piper to provide a ChatGPT-powered legal large language model it calls “CoCounsel,” which can draft a variety of legal documents and which the company claims “has the potential to save up to 60% of attorneys’ time.”⁶

These developments have excited practitioners and unnerved regulators, as the potential use cases for LLMs in the legal field range from glorified document template fetchers to full-on “robot-lawyers.” Use cases describing how LLMs like ChatGPT could interact with the legal field, or indeed how artificial intelligence could interact with society in general, fall into three categories.⁷ The

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¹ See Adam Zewe, *Solving a Machine-Learning Mystery*, MIT NEWS (Feb. 7, 2023), <https://news.mit.edu/2023/large-language-models-in-context-learning-0207>.

² *Hello, We’re LegalZoom*, LEGALZOOM, <https://www.legalzoom.com/about-us> (last visited Mar. 18, 2023).

³ *Case Resolution Platform*, LEGALAI, <https://www.legalai.io/> (last visited Mar. 18, 2023).

⁴ *The Legal AI You’ve Been Waiting For*, CASETEXT, https://casetext.com/cocounsel/?utm_medium=paidsearch&utm_source=google&utm_campaign=brand-research&utm_content=_&utm_term=casetext (last visited Mar. 18, 2023).

⁵ *Id.*

⁶ *Top Global Law Firm DLA Piper Announces Addition of CoCounsel to Enhance Practice and Client Services*, CASETEXT (Mar. 23, 2023), <https://casetext.com/blog/law-firm-dla-piper-announces-casetext-cocounsel/>.

⁷ Shana Lynch, *AI in the Loop: Humans Must Remain in Charge*, STANFORD UNIVERSITY HUMAN-CENTERED ARTIFICIAL INTELLIGENCE (Oct. 17, 2022), <https://hai.stanford.edu/news/ai-loop-humans-must-remain-charge>;

terminology of each model reflects the role humans would ultimately play in an ideal end state of human-LLM interaction: 1) human in-the-loop, 2) human on-the-loop, and 3) human out-of-the-loop.⁸

In the first model, where humans are “in-the-loop,” LLMs are used in the legal field largely as they can be used today, as a starting point for research or responses to basic legal questions.⁹ This might involve summarizing caselaw for attorney review, or drafting part of a document based on an attorney’s inputs. In the second, “on-the-loop” model, LLMs can perform any legal work so long as it is signed off on by a practicing attorney.¹⁰ In this model, LLMs could be used to draft complete legal documents (e.g., a complaint for a matter before a small claims court), but a barred attorney would need to review the documents before signing off on and filing them with a court. In the final and most controversial model, where humans are entirely “out-of-the-loop,” algorithmically powered “robo-lawyers” could provide the full range of legal services, including everything from simply responding to legal questions submitted on a website to listening to a fact pattern from a client, determining what claims that client has against which entities, drafting and filing a complaint and any necessary motions, and even performing settlement negotiations or oral arguments, all without the need for input from a barred attorney.¹¹ Companies like DoNotPay have gotten in legal trouble with state prosecutors for potential unauthorized practice of law (UPL) violations in pursuing this model, but it is this model that DoNotPay and other legal LLM developers are working towards.¹²

All of this raises an important question: just how far can LLMs go in enhancing legal service provision before running afoul of UPL or other legal ethics rules? Through no fault of their own, many articles written in the last few years on the subject have already been overcome by the rapid

Sundar Narayanan, *Human-in-the-Loop or on-the-Loop is Not a Silver Bullet. Evaluate Their Effectiveness*, MEDIUM (Jan. 3, 2022), <https://medium.com/mllearning-ai/human-in-the-loop-or-on-the-loop-is-not-a-silver-bullet-evaluate-their-effectiveness-82f37835d765>; Arne Wolfewicz, *Human-in-the-Loop in Machine Learning: What is it and How Does it Work?*, LEVITY AI (Nov. 16, 2022), <https://levity.ai/blog/human-in-the-loop>; Junzhe Zhang and Elias Bareinboim, *Can Humans be Out of the Loop?*, PROCEEDINGS OF MACHINE LEARNING RESEARCH, vol. 140:1–22, 2022, <https://causalai.net/r64.pdf>.

⁸ This “loop” language is primarily used in the context of the military. For example, Congress recently considered a bipartisan resolution mandating that humans remain “in-the-loop” in decisions to use the nation’s nuclear weapons. See Elizabeth Elkind, *AI Banned from Running Nuclear Missile Systems Under Bipartisan Bill*, FOX NEWS (Apr. 28, 2023), <https://www.foxnews.com/politics/ai-banned-running-nuclear-missile-systems-under-bipartisan-bill>. However, the classifications are equally applicable to any use case. See Shana Lynch, *AI in the Loop: Humans Must Remain in Charge*, STAN. U. HUMAN-CENTERED ARTIFICIAL INTELLIGENCE (Oct. 17, 2022), <https://hai.stanford.edu/news/ai-loop-humans-must-remain-charge>; see also Sundar Narayanan, *Human-in-the-Loop or on-the-Loop is Not a Silver Bullet. Evaluate Their Effectiveness*, MEDIUM (Jan. 3, 2022), <https://medium.com/mllearning-ai/human-in-the-loop-or-on-the-loop-is-not-a-silver-bullet-evaluate-their-effectiveness-82f37835d765>; Arne Wolfewicz, *Human-in-the-Loop in Machine Learning: What Is it and How Does it Work?*, LEVITY AI (Nov. 16, 2022), <https://levity.ai/blog/human-in-the-loop>; Junzhe Zhang and Elias Bareinboim, *Can Humans be Out of the Loop?*, PROCEEDINGS OF MACHINE LEARNING RSCH., vol. 140:1–22, 2022, <https://causalai.net/r64.pdf>.

⁹ See *CoCounsel Is Powered by OpenAI’s GPT-4, the First AI to Pass the Bar*, CASETEXT (Mar. 14, 2023), <https://casetext.com/blog/cocounsel-powered-by-openai-gpt-4/>.

¹⁰ See Zhongxiang Sun, *A Short Survey of Viewing Large Language Models in Legal Aspect*, ARXIV (Mar. 17, 2023), <https://arxiv.org/pdf/2303.09136.pdf>.

¹¹ Bobby Allyn, *A Robot was Scheduled to Argue in Court, then Came the Jail Threats*, NPR (Jan. 25, 2023), <https://www.npr.org/2023/01/25/1151435033/a-robot-was-scheduled-to-argue-in-court-then-came-the-jail-threats>.

¹² See Mandar Karhade, *One AI-Lawyer to Rule Them All: DoNotPay by Joshua Browder*, MEDIUM (Jan. 4, 2023), <https://medium.datadriveninvestor.com/one-ai-lawyer-to-rule-them-all-donotpay-by-joshua-browder-d27924c2a2ef?gi=c5cb7e032e88>.

advancement of LLMs in the legal space.¹³ In this article, I will analyze which of the above three models is likely to best comport with UPL and other ethics laws with regard to the provision of LLM-powered legal services.

In Part II, I describe the state of machine learning and generative AI in both the legal field and in academia generally. In Part III, I analyze state law, federal law, and relevant court rules to determine the extent to which generative AI can be used in the legal profession without breaking the law. I conclude that existing ethics rules and caselaw draw the legal line somewhere between in-the-loop and on-the-loop augmentations by LLMs, and full out-of-the-loop legal service provision almost certainly violates ethics rules in *nearly* every circumstance. In Part IV, I list recommendations for legal service providers to follow so as not to use generative AI illegally.

II. BACKGROUND

A. Large Language Model Mechanics

Just how do LLMs like ChatGPT work? Without getting into too much technical detail, LLMs are “trained” by feeding a high volume of text samples into an algorithm, allowing the algorithm to “guess” a string of text a user is trying to make it produce based on the user’s prompt.¹⁴ The LLM’s responses are sometimes given feedback by human “trainers,” which in turn prods the LLM to refine its guess and produce a string of text that the trainers deem is closer to what the user was asking for.¹⁵ ChatGPT researchers use this “supervised learning” to create guardrails designed to prevent ChatGPT from providing responses with illegal or obscene content.¹⁶ As more text is fed to the algorithm, the training and reinforcement process is repeated until the trainers are satisfied the algorithm is sufficiently skilled at “guessing” a string of text the user is trying to make it produce.¹⁷

This is a key point to keep in mind: in the vast majority of cases, unless it has been explicitly trained to give a certain response to a certain question, there is no actual “reasoning” behind an LLM’s responses, legal or otherwise.¹⁸ The LLM is only giving educated guesses about strings of text that should follow from user prompts based on the titanic amount of text it has been “trained” on.¹⁹ So, for example, if asked, “who was the first President of the United States,” an LLM will only answer correctly because it has been trained with enough documents to respond to the string of letters in the user’s prompt with the letters “W-a-s-h-i-n-g-t-o-n.” In ChatGPT’s case, its creators claim it has been trained on hundreds of millions of documents.²⁰ The model also has upwards of 175 billion “parameters,” or stored values the LLM relies on to form its “guesses” and that it can

¹³ See generally Thomas Spahn, *Is Your Artificial Intelligence Guilty of the Unauthorized Practice of Law?*, 24 RICH. J.L. & TECH. 2 (2018); see also Sean Tu, Amy Cyphert, and Sam Perl, *Limits of Using Artificial Intelligence and GPT-3 in Patent Prosecution*, 54 TEX. TECH L. REV. 255 (2022).

¹⁴ Adam Zewe, *Solving a Machine-Learning Mystery*, MIT NEWS (Feb. 7, 2023), <https://news.mit.edu/2023/large-language-models-in-context-learning-0207>.

¹⁵ *Id.*

¹⁶ Will Douglas Heaven, *GPT-4 Is Bigger and Better than ChatGPT – but OpenAI Won’t Say Why*, TECH. REV. (Mar. 14, 2023), <https://www.technologyreview.com/2023/03/14/1069823/gpt-4-is-bigger-and-better-chatgpt-openai/>.

¹⁷ Zewe, *supra* note 14.

¹⁸ See *ChatGPT: What Is it and How Does it Work?*, ENTREPRENEUR (Feb. 16, 2023), <https://www.entrepreneur.com/science-technology/chatgpt-what-is-it-and-how-does-it-work/445014#:~:text=ChatGPT%20is%20a%20transformer%2Dbased,ChatGPT%20is%20large%2Dscale>.

¹⁹ *Id.*

²⁰ Leo Gao et al., *The Pile: An 800GB Dataset of Diverse Text for Language Modeling*, ARXIV (Dec. 31, 2020), <https://arxiv.org/pdf/2101.00027.pdf>.

independently update as it receives more feedback from its trainers or data from new text sources.²¹ This process of probabilistically “guessing” strings of text to use in prompted responses based on text already fed to the algorithm has led some commentators to describe LLMs as little more than “stochastic parrots,” or a highly sophisticated form of “autocomplete” one might find in an online search engine or a smart phone’s text messaging apps.²²

B. Recent Advancements in Generative AI

To say the technology is advancing at breakneck speed is a massive understatement. In the days after its initial release on November 30, 2022, for example, users quickly found holes in ChatGPT’s grasp of simple trivia. In response to a 50-question battery posed by SCOTUSblog, the bot incorrectly stated that Justice Ginsburg dissented in the landmark marriage case *Obergefell v. Hodges* and misstated dates of famous arguments before the Court.²³ Today, just six months later, ChatGPT still makes factual errors, but its uses have expanded dramatically.²⁴ The bot has passed coding interviews for large software companies like Google and Amazon, outperforming every other applicant in less than four minutes at a task where applicants were allotted two hours.²⁵ The Government Accountability Office and National Institutes of Health have both concluded LLMs like ChatGPT may someday be able to provide more accurate diagnoses of various illnesses than human doctors.²⁶ The team behind ChatGPT also claims it can score in the ninetieth percentile on the SAT,²⁷ the ninety-ninth percentile on the Biology Olympiad,²⁸ and that it can analyze and describe the contents of images.²⁹ Most importantly, one independent research team found the newest iteration, GPT-4, can already pass the Uniform Bar Exam, administered in 36 states,³⁰ and earn a score in the ninetieth percentile of test takers.³¹

²¹ ENTREPRENEUR, *supra* note 18.

²² See *ChatGPT: A Big Step Towards True AI, or Autocomplete on Steroids?*, BUSINESS REPORTER, <https://www.business-reporter.co.uk/technology/chatgpt-a-big-step-towards-true-ai-or-autocomplete-on-steroids> (last visited Apr. 26, 2023).

²³ Debra Cassens Weiss, *ChatGPT Is Asked 50 Questions About Supreme Court; it Got Only 21 Questions Right*, ABA JOURNAL (Jan. 31, 2023), <https://www.abajournal.com/news/article/chatgpt-is-asked-50-questions-about-the-supreme-court-it-got-only-21-questions-right>.

²⁴ See Luca De Biase, *GPT4: The Hallucinations Continue*, OECD (Mar. 17, 2023), <https://www.oecd-forum.org/posts/gpt4-the-hallucinations-continue>.

²⁵ Emily Dreibelbis, *ChatGPT Passes Google Coding Interview for Level 3 Engineer with 183k Salary*, PCMAG (Feb. 1, 2023), <https://www.pcmag.com/news/chatgpt-passes-google-coding-interview-for-level-3-engineer-with-183k-salary>.

²⁶ *Machine Learning’s Potential to Improve Medical Diagnosis*, GOV’T ACCOUNTABILITY OFF. (Nov. 10, 2022), <https://www.gao.gov/blog/machine-learnings-potential-improve-medical-diagnosis>; Yogesh Kumar, Apeksha Koul, Ruchi Singla, and Muhammad Fazal Ijaz, *Artificial Intelligence in Disease Diagnosis: A Systematic Literature Review, Synthesizing Framework and Future Research Agenda*, J. AMBIENT INTEL. AND HUMANIZED COMPUTING, 28 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8754556/#:~:text=Artificial%20intelligence%20can%20assist%20providers,discovery%2C%20and%20patient%20risk%20identification>.

²⁷ Kif Leswing, *OpenAI Announces ChatGPT-4, Claims it Can Beat 90% of Humans on the SAT*, CNBC, <https://www.cnbc.com/2023/03/14/openai-announces-gpt-4-says-beats-90percent-of-humans-on-sat.html> (last visited Mar. 18, 2023).

²⁸ *GPT-4 is OpenAI’s Most Advanced System, Producing Safer and More Useful Responses*, OPENAI, <https://openai.com/product/gpt-4> (last visited Mar. 18, 2023).

²⁹ *Id.*

³⁰ John Keller, *UBE States: Which States Have Adopted the Uniform Bar Exam?*, BAR PREP HERO, (Feb. 21, 2023), <https://barprehero.com/learn/uniform-bar-examination-states/#:~:text=There%20are%2036%20states%20or,Alaska>.

³¹ Daniel Martin Katz, Michael James Bommarito, Shang Gao, and Pablo David Arredondo, *ChatGPT-4 Passes the Bar Exam*, SOC. SCI. RSCH. NETWORK (Mar. 15, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4389233.

Perhaps the highest-profile application of ChatGPT in the legal world was consumer advisory firm DoNotPay’s attempt to allow the bot to argue in court.³² Originally founded to help users find and fill out forms to contest minor traffic and small claims court cases, DoNotPay first made waves in the legal world in early 2023 when its founder, Joshua Browder, integrated ChatGPT into the DoNotPay platform and offered a one-million-dollar reward for any attorney that allowed its bot to argue a case before the Supreme Court.³³ Commentators chided DoNotPay for getting ahead of itself in jumping from traffic court to the highest court in the land (and for not knowing basic court rules at SCOTUS banning the use of listening and recording technology like ear buds),³⁴ and Browder called off the reward when state prosecutors threatened to prosecute him and his company for UPL if DoNotPay ever used a large language model to argue in court.³⁵ Most recently, consumers filed a class action lawsuit against DoNotPay, claiming it offered subpar legal advice while committing a UPL violation.³⁶ Other commentators have noted the bot’s propensity to generate false statements of fact, called “hallucinations,” may expose OpenAI to legal liability.³⁷ In the months since its release, users have reported ChatGPT falsely accusing public figures of sexual assault,³⁸ referencing non-existent news articles,³⁹ and generating legal citations to non-existent caselaw.⁴⁰ But despite these early flaws and controversies, some still see great potential in the technology behind LLMs as it applies to the legal field.⁴¹

III. ANALYSIS

A. American Bar Association Model Rules

The American Bar Association’s Model Rules of Professional Conduct (MRPC) have been adopted by state legislatures in some form in all 50 states and the District of Columbia.⁴² Compliance with the MRPC is the first step towards broader approval of the use of LLMs in legal

³² Helen Hwang, *Meet the AI Lawyer That Wants to Take on the Supreme Court*, AI BUSINESS (Jan. 16, 2023), <https://aibusiness.com/automation/meet-the-ai-lawyer-that-wants-to-take-on-the-supreme-court>.

³³ *Id.*

³⁴ *Entering the Building & Prohibited Items*, SUPREMECOURT.GOV, <https://www.supremecourt.gov/visiting/prohibited-items.aspx> (last visited Mar. 18, 2023). Funnily enough, asking ChatGPT itself whether an attorney could wear earbuds during oral arguments before the Supreme Court results in the chatbot correctly responding that no, you may not.

³⁵ Emma Roth, *DoNotPay Chickens Out on Its Courtroom AI Chatbot Stunt*, THE VERGE (Jan. 25, 2023), <https://www.theverge.com/2023/1/25/23571192/donotpay-robot-lawyer-courtroom>.

³⁶ Reuters, *Lawsuit Pits Class Action Firm Against ‘Robot Lawyer’ DoNotPay*, US NEWS (Mar. 9, 2023), <https://www.usnews.com/news/technology/articles/2023-03-09/lawsuit-pits-class-action-firm-against-robot-lawyer-donotpay>.

³⁷ Alex Brogan, *ChatGPT’s Legal Timebomb Is Ticking, Microsoft Edge Gets Dall-E, OpenAI Defamation Lawsuit*, LINKEDIN (Apr. 10, 2023), <https://www.linkedin.com/pulse/chatgpts-legal-timebomb-ticking-microsoft-edge-gets-dall-e-brogan>.

³⁸ See Pranshu Verma and Will Oremus, *ChatGPT Invented a Sexual Harassment Scandal and Named a Real Law Prof as the Accused*, WASH. POST (Apr. 5, 2023), <https://www.washingtonpost.com/technology/2023/04/05/chatgpt-lies/>.

³⁹ See Adam Kravitz, *ChatGPT and the Future of Corporate Legal Work: Insights and Hallucinations*, FORDHAM J. CORP. & FIN. L. (Mar. 25, 2023), <https://news.law.fordham.edu/jcfl/2023/03/25/chatgpt-and-the-future-of-corporate-legal-work-insights-and-hallucinations/>.

⁴⁰ See Ethan Isaacson, *AI and The Bluebook: Why ChatGPT Falls Short of Traditional Algorithms for Bluebook Legal Citation Formatting*, LOWNEXT (Mar. 26, 2023), <https://directory.lawnext.com/library/ai-and-the-bluebook-why-chat-gpt-falls-short-of-traditional-algorithms-for-bluebook-legal-citation-formatting/>.

⁴¹ CASETEXT, *supra* note 6.

⁴² See generally *Alphabetical List of Jurisdictions Adopting Model Rules*, AM. BAR ASS’N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ (last visited Mar. 18, 2023).

practice. Because of their widespread adoption and their standing as the primary source of ethical rules for barred attorneys in the United States, the MRPC deserve analysis separate from other general state ethics statutes.

Simply put, even were LLMs admitted to “practice law,” they must make significant advancements beyond their current capabilities to provide effective legal service in line with MRPC standards. Citing non-existent caselaw and missing legal issues in a fact pattern clearly violate the basic MRPC Rule 1.1 duty of competence.⁴³ But the duty of competence and many other ethical standards may be violated by any legal professional, and LLMs would obviously need to comply with Rule 1.1 and other duties such as the duty of communication and the avoidance of conflicts of interest.⁴⁴ This section will instead only deal with those challenges unique to LLMs. For example, Comment 8 to Rule 1.1 also states that lawyers “should keep abreast of changes in the law and its practice . . . [and] engage in continuing study and education.”⁴⁵ This may be problematic for LLMs, as OpenAI and other LLM developers do not update their models’ training data on a rolling basis so as not to inadvertently reenact the models to generate output with objectionable content.⁴⁶

Assuming LLMs are one day sufficiently adept at providing legal services to overcome the high bar of legal competence, many more hurdles must be cleared. Rule 2.1 explicitly condones attorneys offering “relevant moral and ethical considerations in giving advice,” noting that “[a]dvice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant,” and that “moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.”⁴⁷ As such, Rule 2.1 also cautions that “[p]urely technical legal advice [] can sometimes be inadequate.”⁴⁸ Therefore, while they do not strictly require attorneys to dispense moral wisdom, the Model Rules do encourage counseling clients on relevant, non-legal, and potentially moral or ethical concerns when those concerns affect a client’s wellbeing or the outcome of the matter. For public relations and liability reasons, however, most commercial LLMs are explicitly trained not to provide moral or ethical opinions.⁴⁹ Indeed, it may be difficult for companies to develop an acceptable, universal moral or ethical code for their LLMs to use to provide adequate legal service.

MRPC Rule 5.3 also presents a substantial barrier to the “human-out-of-the-loop” model if companies with LLMs are not licensed in some way to provide legal services. Rule 5.3 states that lawyers working with nonlawyers must “make reasonable efforts to ensure that the [nonlawyer]’s conduct is compatible with the professional obligations of the lawyer,” seemingly requiring an “on-the-loop” or “in-the-loop” interaction model.⁵⁰

Finally, the MRPC also prohibit insufficient factual investigation, though the risk of prosecution for violations appears low in practice. Of relevance is MRPC Rule 3.1, which simply states that “[a] lawyer shall not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous.”⁵¹ Discipline for violations of this rule typically involve

⁴³ MODEL RULES OF PROF’L CONDUCT R. 1.1 (2019) [hereinafter *MRPC*].

⁴⁴ *Id.* R. 1.4, 1.7.

⁴⁵ *Id.* R. 1.1, Comment 8.

⁴⁶ ChatGPT itself has only been trained on documents up to 2021. See *Knowledge Cutoff Date of September 2021*, OPENAI (Feb. 18, 2023), <https://community.openai.com/t/knowledge-cutoff-date-of-september-2021/66215>.

⁴⁷ MRPC R. 2.1, Comment 2.

⁴⁸ *Id.*

⁴⁹ See Jon Christian, *Amazing ‘Jailbreak’ Bypasses ChatGPT’s Ethics Safeguards*, FUTURISM (Feb. 4, 2023), <https://futurism.com/amazing-jailbreak-chatgpt>.

⁵⁰ MRPC R. 5.3(b).

⁵¹ *Id.* R. 3.1.

attorneys who have taken their clients' word on the facts of a legal matter, something which, so long as they remain confined to servers, LLMs are limited in doing as they cannot conduct their own external factual investigations. However, as observers have noted, Rule 3.1 is rarely enforced.⁵²

B. State Definitions of the "Unauthorized Practice of Law"

A particularly relevant question in determining whether the legal profession can adopt an entirely "human-out-of-the-loop" legal service model is whether such an arrangement would constitute UPL.⁵³ After all, though they may one day achieve a high level of competence in spotting legal issues in fact patterns and generating legal writing, barring a revolutionary change in state legal practice statutes, LLMs cannot graduate from accredited law schools or sit for state bar exams, the most common requirements to practice law across the country.⁵⁴ As such, to use an LLM to provide legal services, companies will need to be certain they are not violating UPL statutes.

All 50 states and the District of Columbia have adopted laws stating that engaging in the "practice of law" without a license is illegal.⁵⁵ However, though it is seemingly central to the regulation of the legal field, what qualifies as the "practice of law" is vague at best.⁵⁶ Though the definition of UPL is largely left to the states, state statutes rarely provide exact definitions, leaving a patchwork of state and federal opinions with inconsistent descriptions of the term.⁵⁷

While it has rarely considered the issue, the Supreme Court has consistently held that what constitutes the "practice of law" is largely to be left to the states, with only very narrow exceptions. In *Brotherhood of R. R. Trainmen v. Virginia ex rel. Va. State Bar*, the Court held that the state of Virginia had a legitimate and legal interest in regulating the practice of law and had the authority to define the practice of law as it pleased, but that barring labor union members from advising other members to seek legal advice if they suffered a work-related injury violated the advising members' first amendment rights.⁵⁸ And in *Sperry v. Florida ex rel. Fla. Bar*, the Court held a patent officer with the Patent Office *did* engage in the practice of law in Florida when he prepared and prosecuted patent applications in violation of Florida's UPL statute, but that the state could not enjoin his activities per Patent Office regulations and federal patent laws that specifically pre-empt state UPL law when it comes to patent applications.⁵⁹

States have addressed the issue of defining UPL with broad and vague definitions that often do little to clarify its scope. Arizona circularly defines law practice as engaging in "the practice of law or [the] provi[sion] of legal services."⁶⁰ Kentucky defines the practice of law as "any service rendered involving legal knowledge or legal advice . . . rendered in respect to the rights, duties, obligations, liabilities, or business relations of one requiring the services."⁶¹ States like Illinois avoid the issue

⁵² See David L. Hudson Jr., *What is a Lawyer's Ethical Duty to Check Out a Client's Claim Before Filing an Action?*, ABA JOURNAL (Apr. 1, 2021), <https://www.abajournal.com/magazine/article/election-fraud-cases-highlight-ethics-rules-on-baseless-complaints>.

⁵³ The MRPC govern only the conduct of lawyers and are silent as to what constitutes legal practice. Model Rule 5.5 addresses the unauthorized practice of law, but only in the context of lawyers practicing law in other jurisdictions in which they are not barred. MRPC R. 5.5.

⁵⁴ See *Comprehensive Guide to Bar Admission Requirements 2021*, AMERICAN BAR ASSOCIATION, 10–34 (2021), https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2021-comp-guide.pdf.

⁵⁵ R. E. Heinselman, *What Amounts to Practice of Law?*, 111 A.L.R. 19, § II.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Brotherhood of R. R. Trainmen v. Virginia ex rel. Va. State Bar*, 377 U.S. 1, 6–7 (1964).

⁵⁹ *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 383 (1963).

⁶⁰ ARIZ. CT. R. 31(a).

⁶¹ KY. CT. R. 3.020.

entirely and simply state it is illegal to “practice as an attorney or counselor at law within this State without having previously obtained a license.”⁶² In a similarly unhelpful example, South Carolina simply bans UPL by saying “[n]o person may either practice law or solicit the legal cause of another person or entity in this State” if they are not licensed.⁶³ In states like these, LLM providers need to be extra cautious of using software to autonomously provide anything remotely resembling legal services.

In one of the most specific and permissive definitions, Texas defines the practice of law as “the preparation of a pleading or other document . . . including the giving of advice or the rendering of any service requiring the use of legal skill or knowledge, such as preparing a will, contract, or other instrument.”⁶⁴ This is a typical vague definition, but the Texas statute also explicitly recognizes disclaimers, saying that the practice of law does *not* include “the design, creation, publication, distribution, display, or sale, including . . . sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products *if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney.*”⁶⁵ In Texas, then, LLM providers may be able to escape legal liability for UPL simply by providing an adequate disclaimer.

Lastly, while the definitions are vague, when clear UPL violations occur, state disciplinary authorities vigorously enforce UPL statutes, often imposing sanctions on suspended or unauthorized out-of-state attorneys practicing law within their jurisdictions.⁶⁶ The Illinois body charged with investigating UPL violations, the Attorney Registration and Disciplinary Commission, notes that these are the most common forms of UPL, and that violations involving true amateurs are rare.⁶⁷ As such, little caselaw exists that might be relevant to a “unlicensed attorney” like an LLM, or the company that owns it, providing legal services.

C. Federal Definitions of the “Unauthorized Practice of Law”

There is no overarching federal statute defining UPL broadly, but various federal statutes, regulations, and court decisions define UPL in certain edge cases.⁶⁸ For example, some federal statutes contain individual definitions of “practice of law”-adjacent terms that are the subject of a great deal of litigation and criminal proceedings. One of the most relevant examples is the oft-cited Bankruptcy Code’s definition of “legal advice,” defined to include, among other things, advising a debtor whether to file petitions, whether to commence cases, whether their debts will be discharged, and whether the debtor will be able to retain their property in bankruptcy.⁶⁹ Citing an increase in UPL violations by scammers targeting undocumented immigrants (so-called “unauthorized practice of immigration law” (UPIIL) violations), the Department of Homeland Security (DHS) promulgated rules specifying that individuals may not prepare immigration documents on behalf of another

⁶² 705 ILL. COMP. STAT. ANN. 205/1 (West 2018).

⁶³ S.C. CODE ANN. § 40-5-310 (1976).

⁶⁴ TEX. GOVT. CODE ANN. § 81.101(a).

⁶⁵ *Id.* § 81.101(c) (emphasis added).

⁶⁶ *See, e.g.,* *In re Murgatroyd*, 741 N.E.2d 719, 719–20 (Ind. 2001); *see also* *In re Conduct of Brandt*, 10 P.3d 906, 908 (Or. 2000).

⁶⁷ *See How the ARDC Tackles the Unauthorized Practice of Law*, ILLINOIS COURTS (Sept. 27, 2017), <https://www.illinoiscourts.gov/News/847/How-the-ARDC-tackles-the-Unauthorized-Practice-of-Law/news-detail/>.

⁶⁸ *See generally*, What Amounts to Practice of Law?, *American Law Reports*, 111 A.L.R. 19.

⁶⁹ 11 U.S.C. §§ 110(e)(2)(B)(i–iii); *see generally* *In re Reynoso*, 477 F.3d 1117 (9th Cir. 2007) (upholding unauthorized practice of law conviction for non-lawyers preparing clients’ bankruptcy forms).

unless they are attorneys or otherwise authorized by DHS to do so.⁷⁰ Federal law also raises the important question of where an LLM is housed. That is, special considerations attach if a law firm uses an off-premises model as opposed to one that is stored on-premises on the firm's internal servers. In handling a matter involving a client's medical history, for example, LLM providers and the firms that use them would need to be careful not to inadvertently violate federal medical privacy laws like the Health Insurance Portability and Accountability Act.⁷¹ Firms must be careful, then, only to use LLMs with secure data storage frameworks.

The few federal appellate cases interpreting the definition of the "practice of law" also offer little guidance. The most relevant case, and perhaps the only one sufficiently on point thus far, is *Janson v. LegalZoom.com, Inc.* In *Janson*, class action plaintiffs accused defendant legal form provider of UPL.⁷² LegalZoom maintained (and continues to maintain) a website offering "blank legal forms that customers may download, print, and fill in themselves."⁷³ At issue were forms offered on the company's internet portal, which LegalZoom used to help customers "prepare [their] legal documents."⁷⁴ Importantly, the advertisements contained a disclaimer that "LegalZoom isn't a law firm. They provide self-help services at your specific direction."⁷⁵ The named plaintiffs had no interaction with any LegalZoom employees, and they admitted they never believed they were receiving legal advice while using the LegalZoom website.⁷⁶

Ignoring the disclaimer and the fact that users never thought they were receiving legal advice, the court held that while providing true do-it-yourself forms to consumers did not constitute UPL, going a step further and filling a form out based on a customer's responses did.⁷⁷ The court noted Missouri statutes defined the practice of law as, in part, "the appearance as an advocate in a representative capacity or the drawing of papers, pleadings or documents or the performance of any act in such capacity in connection with proceedings pending or prospective before any court."⁷⁸ The court wrote that when providing blank forms, "[t]he purchaser understood that it was their responsibility to get it right," but that when a company goes a step further and fills out any portion of the form *for* the customer, it does more than sell a "good" in the form of a blank legal document; it impermissibly participates in the "drawing of papers, pleadings, or documents."⁷⁹ For states with similar "practice of law" definitions, this presents another potential problem, as LLM providers likely could not use a similar argument that the text generated by the LLM is nothing more than an algorithmic output based on users' prompt text. Put simply: at least one circuit court believes providing software to fill out boilerplate forms based on a users' inputs can count as "practicing law," and at the most basic level, that is all any LLM can do. And if other courts follow the Eighth Circuit's lead, it also may not matter that most LLM providers disclaim that they are providing legal services in their terms of use.

Other jurisdictions have considered only tangentially relevant issues. The Second Circuit held a law school graduate who was not yet licensed did not "offer legal advice" or "practice law"

⁷⁰ 8 C.F.R. § 292.1(a); *USCIS Initiative to Combat the Unauthorized Practice of Immigration Law Fact Sheet*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, <https://www.uscis.gov/archive/uscis-initiative-to-combat-the-unauthorized-practice-of-immigration-law-fact-sheet> (last visited: Apr. 27, 2023).

⁷¹ 42 U.S.C. § 1320d-6.

⁷² *Janson v. LegalZoom.com, Inc.*, 802 F.Supp.2d 1053 (8th Cir. 2011).

⁷³ *Id.* at 1054.

⁷⁴ *Id.* at 1055.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1056–57.

⁷⁷ *Id.* at 1064.

⁷⁸ *Id.* at 1058.

⁷⁹ *Id.* at 1064.

when he filled out forms and wrote letters on behalf of a client.⁸⁰ In *Jackson v. United Artists Theatre Circuit, Inc.*, the Nevada District Court held that examination of a witness by a private investigator did not constitute UPL.⁸¹ In another rare finding of UPL, the Third Circuit found a non-attorney defendant did commit UPL, but only because he signed a contract explicitly stating he had professional legal skills and would participate in litigation on behalf of the plaintiff.⁸² And while they are generally not charged with enforcing UPL provisions, both the Federal Trade Commission and the Department of Justice have expressed their support for the District of Columbia’s definition, which includes “the provision of professional legal advice or services where there is a client relationship of trust or reliance.”⁸³

The bottom line is that even providing legal-adjacent services may land LLM providers in hot water. Giving advice on how to handle debts, advising clients on the immigration process (even in good faith), and automatically filling out forms based on user inputs, *even when clients believed they were not receiving legal advice*, have all been found to violate federal UPL laws. As such, LLM providers must take care not only to avoid providing “traditional” legal advice, but also to proactively put guardrails in place to disallow their algorithms from dispensing law-adjacent advice, as well.

D. Court Rules

Lastly, even if a company manages to avoid UPL liability under state and federal law, one other source of law may prove troublesome to LLMs attempting to provide legal services: the Federal Rules of Civil Procedure (FRCP).⁸⁴ Even if a company selling LLM-powered legal services only operates in a state where they can provide such services with disclaimers, or if staff attorneys sign off on all legal work performed by an LLM, its lawyers may still not be able to overcome this final hurdle. Specifically, FRCP Rule 11 states that attorneys, in filing pleadings or other written motions, must certify that “to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,” the document is not being filed for an improper purpose, the claims are not frivolous, and the factual contentions are supported by evidence.⁸⁵ Such an “inquiry reasonable under the circumstances” has been held to include, at the bare minimum, not relying entirely on the personal knowledge of the client.⁸⁶ As LLMs cannot interact with a case beyond fact investigation from the client, their capabilities would need to be vastly expanded to comply with Rule 11’s investigatory requirement. This is particularly important as the court noted in *Shrock v. Altru Nurses Registry* that Rule 11 is not to be taken lightly, nor is it up to a judge’s discretion to decide whether a violation ought to be punished, as the rule *requires* the court to impose sanctions for Rule 11 violations.⁸⁷

E. General Takeaways and Other Considerations

Three key factors may complicate the LLM-UPL interaction that are not present in many of the cases discussed thus far (save for, perhaps, *Janson*): 1) some LLMs are trained in part by in-house

⁸⁰ *Wynns v. Adams*, 426 B.R. 457, 462–63 (2d Cir. 2010).

⁸¹ *Jackson v. United Artists Theatre Cir., Inc.*, 278 F.R.D. 586, 596–97 (D. Nev. 2011).

⁸² *In re Benninger*, 357 B.R. 337, 353 (3d Cir. 2006).

⁸³ U.S. DEP’T OF JUST., COMMENTS ON REVISED PROPOSED RULE CONCERNING UNAUTHORIZED PRACTICE OF LAW (2009).

⁸⁴ FED. R. CIV. P. 2.

⁸⁵ *Id.* 11(b).

⁸⁶ *Shrock v. Altru Nurses Registry*, 810 F.2d 658, 661–62 (7th Cir. 1987).

⁸⁷ *Id.* at 661.

attorneys,⁸⁸ potentially opening those companies to legal liability for holding themselves out as providing legal services; 2) LLMs largely have user agreements reminding users that the LLM is not meant to give legal advice and making users agree to relieve the company of legal liability for providing bad legal advice if it does,⁸⁹ potentially enabling companies in states like Texas to contract around licensing requirements; and 3) many LLMs are general purpose and not designed specifically to provide legal services, instead functioning more like a very sophisticated search engine,⁹⁰ potentially giving LLMs deniability in accusations of UPL when users prompt the models to generate legal advice.

The most interesting and relevant of these three hitches is the first, that some LLMs are trained by licensed attorneys and that, as the models are fed and trained on ever increasing amounts of legal text, the accuracy of their responses will only improve.⁹¹ The stated policy purpose behind most state UPL statutes is not to prevent competition with the state bars, but to protect the unsuspecting public from the incompetent provision of legal services from individuals who have not had formal, rigorous legal training and passed a competency test in the form of a bar exam.⁹² Where patent officers, bank employees, realtors, and blank form providers might inadvertently commit UPL under a variety of state and federal statutes *any* time they offer legal services because they are part of the aforementioned individuals lacking rigorous training, LLMs are being trained by lawyers with vast arrays of legal text and could conceivably surpass average practicing lawyers in the provision of legal services.⁹³ Indeed, as mentioned above, ChatGPT can already pass the Uniform Bar Exam, and public court records provide a trove of legal text with which to train it to better understand any kind of complaint, brief, motion, or opinion.⁹⁴ Still, policy arguments and projections about the future capabilities of LLMs aside, for now the statutory text in most states is clear enough: companies may absolutely not provide “legal services” if those services are not being provided by a company lawyer.

Second, in states like Texas, where individuals can avoid liability simply by informing users of their non-licensed status, LLMs may find a safe harbor so long as they only service Texas residents.⁹⁵ However, Texas appears to be the exception that proves the rule, as no other state permits such an arrangement.⁹⁶

Third, it is possible LLMs can shield themselves from *Janson*-type liability (again, in states like Texas) simply by preventing their algorithms from filling out forms on behalf of their users. Again, the Texas statute permits “the design, creation, publication, distribution, display, or sale, including

⁸⁸ See, e.g., *The Legal AI You’ve Been Waiting For*, CASETEXT, <https://casetext.com/cocounsel/> (last visited Apr. 27, 2023) (“Our attorneys and AI specialists spent months developing and repeatedly testing an OpenAI-powered solution tailored to lawyers’ needs and reliable and secure enough to meet the highest bar.”).

⁸⁹ *Terms of Use*, OPENAI (Mar. 14, 2023), <https://openai.com/policies/terms-of-use>.

⁹⁰ Some companies, like OpenAI parent company Microsoft, are working on incorporating LLMs into their search engines. *Introducing the New Bing. Your AI-Powered Copilot for the Web*, MICROSOFT, https://www.microsoft.com/en-us/bing?form=MW00X7&ef_id=_k_CjwKCAjw__ihBhADEiwAXEazJqwgLjw-qjgkNNkCjAQXBjInSH0KYAouv6A1rpB3eDUaT32lkZh5nhoCeyEQAvD_BwE_k_&OCID=AIDcmmf8m4fdss_SEM_k_CjwKCAjw__ihBhADEiwAXEazJqwgLjw-qjgkNNkCjAQXBjInSH0KYAouv6A1rpB3eDUaT32lkZh5nhoCeyEQAvD_BwE_k_&glid=CjwKCAjw__ihBhADEiwAXEazJqwgLjw-qjgkNNkCjAQXBjInSH0KYAouv6A1rpB3eDUaT32lkZh5nhoCeyEQAvD_BwE&ch (last visited Apr. 27, 2023).

⁹¹ CASETEXT, *supra* note 88.

⁹² MRPC R. 5.5, Comment 2; Katz et al., *supra* note 31.

⁹³ CASETEXT, *supra* note 88.

⁹⁴ Katz et al., *supra* note 31.

⁹⁵ TEX. GOVT. CODE ANN. § 81.101(c).

⁹⁶ See Heinselman, *supra* note 55, Table of Cases, Laws, and Rules.

publication, distribution, display, or sale by means of an Internet web site, of written materials, books, forms, computer software, or similar products,” so long as those products are clearly marked as not constituting legal advice. However, as, again, LLMs thus far have poor, easily sidestepped guardrails in place, this will require greater attention from companies looking to avoid UPL liability in the future.

IV. RECOMMENDATION

Companies employing LLMs intending to use them to provide anything even approximating legal services are in a difficult spot. By all indications, virtually every state is outwardly hostile to the idea of non-lawyers providing legal services.⁹⁷ However, what counts as a “legal service” is not clearly defined, and even when UPL cases do reach the courts, they seem hesitant to find companies employing law-adjacent experts, like realtors and bank officers, liable.⁹⁸ Further, any attempt to fill out or draft a legal document on behalf of a client seems likely to provoke sanctions.⁹⁹ And even if a company tries to disclaim liability for providing such a basic legal service, they may still run afoul of the FRCP reasonable inquiry requirement.¹⁰⁰ For now, the best course for companies employing LLMs is likely to avoid using LLMs to provide legal advice directly to consumers and to enhance guardrails preventing users from querying them for legal advice. Any LLM output should be run by company attorneys, and only after those attorneys have a personal consultation with the client in question and performed their own fact investigations. Companies can hope that the past trend of UPL cases rarely reaching the courts will continue, but the high-profile DoNotPay incident makes that possibility seem increasingly distant. In short, the line between UPL and legitimate non-legal business is too poorly drawn, too inconsistently enforced, and too cumbersome to comply with for any LLM provider to try to wade into the field with a truly “out-of-the-loop” model at this point.

V. CONCLUSION

While it may be some time before LLMs are able to provide expert-level legal advice, the technology is improving rapidly, and businesses would do well to keep up with advancements in the field. Policymaking bodies like state legislatures and bar associations should also take note, as LLMs offer one potential tool to improve efficiency and alleviate the massive legal services gap for low-income individuals in the future.¹⁰¹ Still, anyone interested in using the technology should be cautious, as generative AI seems likely to remain a legal and ethical minefield for some time.

⁹⁷ See generally *supra* Section III.b.

⁹⁸ See generally *supra* Section III.c.

⁹⁹ *Janson v. LegalZoom.com, Inc.*, 802 F.Supp.2d 1053, 1064 (8th Cir. 2011).

¹⁰⁰ *Id.*

¹⁰¹ See Eric Eckert, *Baylor Law School: ‘100 Million Americans Can’t Afford Legal Services. What Can We Do About It?*, BAYLOR U. (Sept. 15, 2016), <https://news.web.baylor.edu/news/story/2016/baylor-law-school-100-million-americans-cant-afford-legal-services-what-can-we-do#:~:text=%22We%20said%2C%20'More%20than,lawyers%20to%20open%20law%20firms> (Baylor Law professor estimating that over 100 million Americans cannot afford legal services).