ChatGPT: A Piece of the Puzzle, Not a Panacea

By Garrett Brodeur and Liz Grant[*]

INTRODUCTION

After a string of failures in the cryptocurrency industry and the emergence of artificial intelligence ("AI"), many observers would likely agree that *crypto is tired and AI is wired.* AI is making inroads into professional service industries and could drastically change the work of attorneys and tax practitioners.[1] Despite the advantages of large language models, including generative AI like ChatGPT, the technology must be reconciled with existing ethical frameworks. The ABA's Model Rules of Professional Conduct ("MRPC") and the Treasury Department's Circular No. 230 ("Circular 230") are just two examples of frameworks that pose obstacles[2] for the adoption of ChatGPT by attorneys and tax practitioners.[3]

ChatGPT has received significant attention as a legal tool,[4] but relatively little has been said about the feasibility of the technology for tax practitioners. The MRPC and Circular 230 both require professional and ethical judgment for anyone using ChatGPT, but Circular 230 imposes far greater restrictions on tax practitioners. Most significantly, it effectively prohibits the use of the technology when tax practitioners are providing "written advice," creating difficult considerations for tax accounting firms and other tax practitioners seeking to use ChatGPT to streamline costs. Given this obstacle and numerous others, tax practitioners should treat ChatGPT as a small piece of the puzzle rather than a panacea.

WHAT IS ChatGPT AND HOW DOES IT WORK?

ChatGPT is a type of "Generative Pre-trained Transformer" ("GPT")[5] that was first introduced by OpenAI, an American artificial intelligence organization, as a prototype on November 30, 2022. The latest

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[1] Ed Felten, Manav Raj, and Robert Seamans, *How Will Language Modelers Like ChatGPT Affect Occupations and Industries?* Discussion Draft (Mar. 18, 2023) (finding, among other things, that the top industries exposed to advances in language modeling are legal services and securities, commodities, and investments), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4375268; *see also* Tyna Eloundou et al., *GPTs Are GPTs: An Early Look at the Labor Market Impact Potential of Large Language Models*, Working Paper (Mar. 23, 2023), available at: https://www.researchgate.net/publication/369369163_GPTs_are_GPTs_An_Early_Look_at_the_Labor_Market_Impact_Potential_of_Large_Language_Models.

[2] *See* Christopher M. Ferguson, *The Lawyer's Guide to Cryptocurrency: Ethical, Tax, and Reporting Issues with the Receipt of Cryptocurrency as Payment for Legal Services*, J. of Tax Pract. & Proc. (Fall 2022), available at: https://kflaw.com/the-lawyers-guide-to-cryptocurrency-ethical-tax-and-reporting-issues-with-the-receipt-of-cryptocurrency-as-payment-for-legal-services/.

[3] Circular No. 230 applies to persons who "practice before the Internal Revenue Service" (i.e., "attorneys, certified public accountants, enrolled agents, enrolled retirement plan agents, registered tax return preparers, and other persons representing taxpayers before the IRS."). Circular 230, §10.30(a).

[4] *See, e.g.*, Andrew Perlman, *The Implications of ChatGPT for Legal Services and Society* (Dec. 5, 2022), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4294197; Nicole Black, *The Case for ChatGPT: Why Lawyers Should Embrace AI*, ABA J. (Feb. 21, 2023), available at: https://www.abajournal.com/columns/article/the-case-for-chatgpt-why-lawyers-should-embrace-ai.

[5] Generative Pre-Trained Transformers ("GPT") are a subset of large language models and were first introduced in 2018 by the American artificial intelligence organization, OpenAI.

model of ChatGPT (GPT-4) was released on March 14, 2023, and is available for paid subscribers on a limited basis.

GPTs are trained on large datasets of unlabeled text and can generate novel human-like content in many formats, including images, text, and audio. GPTs are inherently ''generative,'' meaning that they expand on their initial training by learning from user interactions. In recent months, ChatGPT has drawn criticism due to confidentiality concerns and inaccuracies resulting from ''AI hallucination,'' described below.

The use of ChatGPT presents confidentiality issues for professionals who maintain sensitive client information. According to OpenAI's ''Privacy Policy,'' the company collects ''personal information'' and ''user content'' (i.e., information ''included in the input, file uploads, or feedback that [users] provide to our services'') from ChatGPT users.[6] This information could easily include client-sensitive information if it is, for example, entered by an attorney or an attorney's assistant into a ChatGPT search prompt. Additionally, and perhaps most importantly, the Privacy Policy indicates that OpenAI uses personal information (including user content) for administering and maintaining services, conducting research, and ''communicating with users.''[7] In other words, ChatGPT not only collects user content, but also uses the information to communicate with other users. This information sharing is the key to how ChatGPT functions — much like the ''predictive text'' or auto-correct function on an iPhone, ChatGPT pools user inputs and uses the information to ''learn'' and pattern its future responses. As such, when a user shares information with ChatGPT using a routine voice prompt, the information is by design pooled and shared with all other ChatGPT users.

In addition to confidentiality concerns, ChatGPT has also drawn criticism for its tendency to ''hallucinate.'' ''AI hallucination'' occurs when an AI system is unable to properly interpret data and, as a result, generates inaccurate or unusual outputs. AI hallucinations can take many shapes, from reports of fake news to false documents or assertions about people, historical events, or scientifically proven facts. For example, a program like ChatGPT can create a fake 19th-century Impressionist artist with a full biography and list of artwork that is entirely false. To make matters worse, these inaccuracies are often communicated convincingly and in misleading ways. In addition to hallucination, the most recent version of ChatGPT (GPT-4, the version currently available to the public) generally lacks knowledge of events that occurred after September 2021. OpenAI has acknowledged all of these deficiencies in a recent technical report.[8]

ChatGPT's confidentiality and accuracy issues are significant and have direct consequences under the ethical rules that apply for legal and tax professionals.

ChatGPT AND THE ABA'S MODEL RULES OF PROFESSIONAL CONDUCT

The MRPC create difficult questions for attorneys seeking to incorporate ChatGPT into their practice.

Rule 1.1 requires an attorney to provide ''competent representation'' by possessing the legal knowledge, skill, thoroughness, and preparation reasonably necessary for a given legal matter. Comments to this rule highlight two immediate issues for ChatGPT-savvy attorneys.

First, to competently handle a matter, an attorney must use ''methods and procedures meeting the standards of competent practitioners.''[9] At this time, it appears that generative AI like ChatGPT does not satisfy this standard. The comments state that this determination largely depends on ''what is at stake'' with ''major litigation and complex transactions'' requiring more extensive treatment.[10] Even in the most complex of cases where ChatGPT might have value at scale, the ABA's comments could not have envisioned[11] the emergence of AI or its tendency to produce inaccurate results. OpenAI also admits that ChatGPT is ''not fully reliable'' and should be used with ''great care . . . particularly in high-stakes contexts.''[12] ChatGPT in its current form does not align with the standards one would expect of a competent practitioner.

Second, attorneys must ''maintain competence'' by keeping abreast of changes in the law and its practice, ''including the benefits and risks associated with rel-

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[8] *GPT-4 Technical Report*, OpenAI, at 10 (Mar. 27, 2023), available at https://arxiv.org/pdf/2303.08774.pdf.

[9] Model Rules of Prof'l Conduct (MRPC) r. 1.1 cmt. 5 (Am. Bar Ass'n 1983).

[10] *Id.*

[11] The most recent amendment to the MRPC occurred in August 2020, long before the public introduction of generative AI, when the House of Delegates approved changes to Rule 1.8(e).

[12] *See GPT-4 Technical Report*, OpenAI, at 10 (Mar. 27, 2023), available at https://arxiv.org/pdf/2303.08774.pdf (''Most importantly, [GPT-4] still is not fully reliable (it ''hallucinates'' facts and makes reasoning errors). Great care should be taken when using language model outputs, particularly in high-stakes contexts, . . .'').

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[6] *Privacy Policy*, OpenAI (updated Apr. 7, 2023), available at https://openai.com/policies/privacy-policy.

[7] *Id.*

evant technology.''[13] For all attorneys (not just those actively using ChatGPT), the Model Rules explicitly require an active awareness of developments relating to generative AI and its practicality under a variety of circumstances. As the technology develops, attorneys must determine when the use of ChatGPT and other generative AI models may be appropriate for their legal services. This includes an awareness of confidentiality and accuracy issues.[14]

Rule 1.2 requires an attorney to abide by a client's decisions concerning the objectives of the representation and ''consult with the client as to the means by which [the objectives] are to be pursued.''[15] Most clients are likely unaware of ChatGPT's capabilities in legal settings, so it is important for any attorney using the technology to obtain informed client consent by explaining the technology's strengths and weaknesses, including the possibility of confidentiality and accuracy issues. Relatedly, Rule 1.4 requires attorneys to ''consult and explain'' when communicating with clients about legal matters,[16] so that the client has ''sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.''[17] As with Rule 1.2, when using ChatGPT or any other form of generative AI, an attorney must fully explain the technology to allow the client to provide informed consent to its use.

Rule 1.6 imposes arguably the most prohibitive requirement concerning the use of generative AI in legal settings — confidentiality. Specifically, an attorney must not reveal information relating to the representation of a client and must ''make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information re-

lating to the representation of a client.''[18] As explained above, ChatGPT and other generative AI models ''learn'' from user interactions by taking whatever information users provide and using it to influence future outputs. If an attorney or an attorney's assistant inputs sensitive or confidential client information into a generative AI model, the attorney likely violates Rule 1.6 and the requirement to ''make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.''

ChatGPT AND CIRCULAR 230

While the MRPC raise important considerations for attorneys seeking to use ChatGPT, Circular 230 imposes additional and much more stringent requirements on tax practitioners. When ''written advice'' is involved, Circular 230 would appear to prohibit the use of ChatGPT entirely.

Section 10.22 of Circular 230 generally requires practitioners to exercise ''diligence as to accuracy'' in preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service (IRS) matters, as well as in determining the correctness of oral or written representations made by the practitioner to the Treasury Department.[19] For these purposes, a tax practitioner is presumed ''diligent'' if they rely on the work product of another person and use reasonable care in engaging, supervising, training, and evaluating the person.[20] Setting aside the question of whether ChatGPT should be considered a ''person'' under this rule, it is technically impossible for a tax practitioner to train or supervise a large language model like ChatGPT, which runs on a mix of past training data provided by a development team and subsequent information provided by users. Tax practitioners have no control or supervisory authority over ChatGPT. Additionally, in many circumstances it may be impractical to expect the typical tax practitioner to detect nuanced biases or inaccuracies in the results of ChatGPT's output, because AI hallucinations and other inaccuracies are typically presented convincingly and without warning.

Circular 230 also imposes significant requirements on tax practitioners providing ''written advice'' (including by electronic means).[21] Section 10.37 requires that any tax practitioner providing written ad-

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[13] MRPC r. 1.1 cmt. 8.

[14] New York State recently adopted a new CLE rule (effective July 1, 2023), that will require all New York attorneys to complete one credit hour in a new ''Cybersecurity, Privacy and Data Protection'' category as part of their CLE requirements. This requirement can be fulfilled with coursework on topics such as the inadvertent or unauthorized electronic disclosure of confidential information and ''sources of lawyers' ethical obligations and professional responsibilities and their application to electronic data and communication.'' With the emergence of generative AI and its impact on the legal profession, it seems reasonable to expect other states to follow suit.

[15] Comments to this rule add that attorneys may also take actions that are impliedly authorized to carry out the representation. *See* MRPC r. 1.2 cmt. 1.

[16] First, an attorney must ''reasonably consult with the client about the means by which the client's objectives are to be accomplished.'' MRPC r. 1.4(a)(2). The attorney must also explain the client's legal matter so the client can make informed decisions regarding the representation. MRPC r. 1.4(b).

[17] MRPC r. 1.4 cmt. 5. It is equally important to note that an attorney may not withhold information to serve their own interest or convenience. MRPC r. 1.4 cmt. 7.

[18] MRPC r. 1.6(a), (c).

[19] Circular 230, §10.22(a).

[20] *Id.* at §10.22(b).

[21] The definition of ''written advice'' does not include government submissions on matters of general policy or continuing education presentations provided solely to enhance an audience's fed-

vice must (i) base the written advice on reasonable, factual, and legal assumptions (including as to future events); (ii) reasonably consider all relevant facts and circumstances that the practitioner knows or should know; (iii) use reasonable efforts to identify and ascertain the facts relevant to written advice on the subject matter of the advice; and (iv) not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable.[22] Given these requirements, it seems impossible for a tax practitioner to rely on ChatGPT to form the basis for written advice due to the accuracy issues noted above and OpenAI's own admission that ChatGPT is "not fully reliable." With ChatGPT's known tendency to hallucinate and generate inaccurate responses with confidence,[23] any written advice provided partly using ChatGPT would presumably be based on unreasonable factual or legal assumptions. Written advice generated using ChatGPT would also fail to consider "all relevant facts and circumstances known to the practitioner," because ChatGPT does not consider taxpayer-specific circumstances[24] or events post-September 2021 (presumably including routine, daily IRS guidance).[25] ChatGPT has also been known to respond differently to identical prompts,[26] because it is sensitive to nuanced factors such as the phrasing and quality of a user's input. For these reasons, providing "written advice" based even partly on representations, statements, or findings of ChatGPT would violate the requirements of Circular 230.

Any tax practitioners considering whether to use technology like ChatGPT in their practice should consider Circular 230's significant and largely prohibitive requirements pertaining to "written advice." Until OpenAI has demonstrated improvements in reliability and accuracy,[27] providing written advice concerning federal tax matters in reliance on ChatGPT likely violates the requirements of Circular 230.

ADDITIONAL TAKEAWAYS

Beyond the immediate ethical concerns for attorneys and tax practitioners, ChatGPT has additional ramifications for the broader legal industry.

There is certainly potential for attorneys to use ChatGPT in their regular practice. After all, ChatGPT has passed the Uniform Bar Exam with a score in the 90th percentile[28] and many believe it is capable of "research and information gathering, document generation, and case analysis."[29] But, considering that research and information gathering may be inaccurate and that case-specific analysis would likely require attorneys to input confidential information into ChatGPT, the safest use case for ChatGPT may be document generation, particularly for litigators preparing for trial.

Instead of asking ChatGPT to generate case-specific trial materials, attorneys can instead ask for general outlines of materials to use for preparation. For example, a user can ask ChatGPT to create an outline of an opening statement for the defense of a robbery case. Similarly, in the tax context, a user can ask for an outline of a direct examination of a foreign financial advisor, focusing on the advisor's statements and knowledge of foreign accounts, in order to challenge a taxpayer's FBAR penalties. Once an outline is in hand, the attorney can edit the information to include confidential information and case-specific facts. This approach can also be used to write briefs, affidavits of service, or other legal documents, likely saving time (and client money) while preparing for litigation.[30]

But there are risks associated with drafting these materials that can result from biases in generative AI's training data. Imagine, for example, if ChatGPT analyzed a transcript of *My Cousin Vinny* and used it to learn about expert witness testimony. In generating an outline of a direct examination for an expert, ChatGPT may include cheeky questions that might be inappropriate for a real trial or may try to establish (as

eral tax knowledge. Circular 230, §10.37(a)(1).

[22] Circular 230, §10.37(a)(2).

[23] *GPT-4 Technical Report*, OpenAI, at 10 (Mar. 27, 2023), available at https://arxiv.org/pdf/2303.08774.pdf.

[24] ChatGPT itself acknowledges that it does not consider a taxpayer's unique facts and circumstances in rendering tax advice. In response to the prompt "Can a taxpayer rely on ChatGPT for tax advice?" ChatGPT answered: "As a language model, ChatGPT is not a licensed tax professional and cannot provide specific tax advice . . . it is always recommended to consult with a licensed tax professional who has knowledge of the specific laws and regulations in your state or country and who can provide personalized advice based on your individual circumstances."

[25] *GPT-4 Technical Report*, OpenAI, at 10 (Mar. 27, 2023), available at https://arxiv.org/pdf/2303.08774.pdf.

[26] *See* https://www.reddit.com/r/ChatGPT/comments/10ifobv/why_did_chatgpt_give_different_answers_to_the/.

[27] *See id.* ("Despite its capabilities, GPT-4 has similar limita-

tions as earlier GPT models. Most importantly, it still is not fully reliable (it "hallucinates" facts and makes reasoning errors). Great care should be taken when using language model outputs, particularly in high-stakes contexts, with the exact protocol (such as human review, grounding with additional context, or avoiding high-stakes uses altogether) matching the needs of specific applications.").

[28] *Id.* at 6.

[29] Andrew Perlman, *The Implications of ChatGPT for Legal Services and Society* (Dec. 5, 2022), available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4294197.

[30] Beyond ChatGPT's impact on client service, the technology also promises to influence legal education. Further research on AI's impact on skills development in law schools could provide valuable guidance for educators seeking to incorporate ChatGPT into legal curriculum.

was the case with Vinny Gambini and Mona Vito) that the directing attorney is romantically involved with the witness. Generative AI would likely correct these errors over time, but the risk will remain difficult to isolate and eliminate. Similarly, ChatGPT could generate outlines with writing styles or rhetorical techniques that fail to account for the preferences of different judges or jurors. In the tax context, ChatGPT could easily overlook the importance of the *Golsen* Rule[31] in drafting an outline of a Tax Court brief and apply the wrong jurisdictional precedent. Drafted materials for trial preparation could also contain conventions that are not common in every jurisdiction (for example, the phrase ''pass the witness'' is common in

some courtrooms, while the phrase ''no further questions'' is preferred in others). Correcting these issues could take an attorney more time than if they had written the outline themselves, potentially negating the benefit of using ChatGPT.

These risks emphasize that — at least for now — using ChatGPT to draft complete legal documents, and perhaps even outline them, is no substitute for the judgment and craft that attorneys contribute by creating documents themselves.

CONCLUSION

ChatGPT (like all generative AI) is a powerful tool with the potential to streamline the work of attorneys and tax practitioners, but the technology must be reconciled with existing ethical frameworks. The numerous ethical and accuracy-related issues raised by using ChatGPT strongly suggest that, at least for now, attorneys and tax practitioners should treat ChatGPT as a small piece of the puzzle, not a panacea.

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[31] In *Golsen v. Commissioner*, 54 T.C. 742 (1970), the U.S. Tax Court stated the principle that it will follow the precedent and apply the law of the Court of Appeals with jurisdiction over the taxpayer's place of residence. Therefore, under the *Golsen* Rule, the Tax Court may render different decisions based on identical situations (as a result of applying different legal precedent), for taxpayers who reside in different jurisdictions.