The DTCWV
Defender

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Utilizing Artificial Intelligence with the Law

Introduction

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This Defender is dedicated to Artificial Intelligence. Artificial Intelligence ("AI") is here and is already becoming an important part of the legal landscape. From the articles, you can readily determine that members of our organization are using AI to enhance the proficiency of their practices. The adage, "if you can't beat them, join them," is applicable to AI with the modifier, "if you can't beat them, join them responsibly." Lawyers are aware of the controversy surrounding the use of AI but are quickly taking advantage of its benefits. Serious concerns are present that AI might adversely affect our profession, but the genie is out of the bottle, and we trust that these articles will help you navigate these complicated waters.

We lead off with an article by Shari Belitz, Esquire. Shari is a nationally recognized litigation consultant. She recently contributed a chapter to a book entitled "Legal Operations in the Age of AI and Data." For those of you who are interested in a deep dive into the subject matter, the book will be available soon. I have read portions of the advanced copy, and it provides cutting edge information. Shari advises us that AI can be used to assist in the selection of juries. She identifies the tools you will need to use AI for jury selection and potential ethical issues surrounding its use. AI is best used in conjunction with answers to jury questionnaires received in advance of trial so that it can be analyzed ahead of time. However, technology is available to use AI even if you do not have the benefit of jury questionnaires or good jury biographies prior to selection. If you would like more information regarding the book, please do not hesitate to email me or Shari for further details.

We are very pleased to receive an article by Amy B. Cyphert, Lecturer in Law, West Virginia University College of Law. Professor Cyphert has authored legal articles on generative AI and Large Language Models (LLMs). She writes about the positive benefits regarding AI as well as the potential downsides for the profession. Professor Cyphert gives recommendations on how to navigate this difficulty. Professor Cyphert is a speaker at our annual meeting, and you will get an opportunity to hear and meet her. Having her as an AI academic resource for the attorneys in this state is a real benefit.

Veteran contributor Lindsey Saad of Dinsmore & Shohl LLP provides an article titled, "Four Tips For Using AI in Your Civil Defense Practice." Lindsey explains how you can use AI for deposition outlines, written discovery, brainstorming ideas, and receiving feedback on motions and briefs. I personally find the AI feedback on motions and briefs to be valuable. Thanks to Lindsey for providing us with insight on all the ways AI is of assistance to busy practitioners.

Regular contributor Evan Kime of Jackson Kelly PLLC gives us "Beyond Boundaries: How AI is Poised to Change Healthcare and Challenge Healthcare Law." Evan writes about how AI has revolutionized patient care and efficiency. Like with all new technologies, complex legal issues arise stimulating congressional legislation

Highlights

and executive orders from the Office of the Presidency. Those of us who practice healthcare law and those who are concerned with privacy issues will benefit from Evan's article.

Our former President Susan Snowden of Jackson Kelly PLLC provides us with "Revolutionizing Presentation Strategies with AI: A Legal Perspective." Susan advises on how AI is affecting the traditional means by which we present cases and provides new means for strengthening case presentations and strategies. As I read Susan's article, I wondered how we may be able to discern when opposing counsel is using the benefits of AI in either written or oral advocacy. We want to be ahead of the curve in our trial advocacy skills, and Susan shows us the way.

Continuing contributor Christopher Etheredge of Babst Calland writes "Artificial Turns Official: Regulating Lawyers in the Dawn of AI." This article brings to fore the legislative efforts to regulate AI, the West Virginia Judicial Investigation Commission's published advisory opinion regarding AI, and the West Virginia Lawyer Disciplinary Board's draft legal ethics opinion addressing AI. This is a must read for all of us so we will not run afoul of our ethical obligations and our duties to adhere to the Rules of Professional Conduct. Christopher reminds us that you can comment on the new ethical rules now being considered. You might want to consider putting this article on your desktop for easy reference.

Marc Williams of Nelson Mullins is always on the cutting edge of technology and provides us with "The Impact of Artificial Intelligence on the Defense Lawyer." Like the other contributors, Marc understands the revolutionary aspect of AI and the need for civil defense practitioners to understand it and appreciates the ramifications to the profession now and in the future. Those of us who learn, understand, and use AI, will have a competitive advantage over others in our profession. Marc warns us that AI may have an impact on the use of associates by potentially reducing the amount of time needed for researching answers to questions and writing memoranda.

Your Executive Editor is especially proud of this Defender because it reveals that these civil defense lawyers in the State of West Virginia are using AI and recognizing the need to exercise caution with it. The responsible use of AI will keep our members in the forefront of litigation advocacy. As you have learned from this Defender, litigation consultants and those in academia are continuing to search for new ways in which AI can enhance the legal profession.

As always, if you have a topic you would like the Defender to focus on, or if you would like to write an article for the Defender, please do not hesitate to contact me at cbailey@baileywyant.com or (304) 345-4222 or (304) 546-6986.

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42nd Annual Meeting

Marriott Grande Dunes Resort
Myrtle Beach, South Carolina
June 9 – 12, 2024

Jury Selection in the Age of Artifical Intelligence

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I started practicing law in the 1990's, and if you told me one day we would attend court conferences and mediations in front of a computer, hit a button to ensure our cases were still good law, and be able to write briefs using the equivalent of a robot, I would not have believed you. In fact, the first time the subject of Artificial Intelligence (AI) in jury selection was mentioned I called it "Jetson Selection," as the idea seemed plucked right out of the animated television show about the future.

To understand how AI can be used in jury selection, a preliminary step is to operationalize both terms. AI in its broadest sense, is intelligence exhibited by computer systems as opposed to the natural intelligence of living beings. As a field of research, it develops and studies methods and software which enable machines to perceive its environment and take actions that maximize their chances of achieving defined goals, with the aim of performing tasks typically associated with human intelligence. [1] The seven branches of AI are: Computer vision; fuzzy logic; expert systems; robotics; machine learning; neural networks/deep learning; and natural language processing (NLP).[2]

The term "jury selection" is not quite as broad as AI, but not simplistic either. Lawyers focus on one or several aspects depending upon how the jury selection process is conducted in each jurisdiction or court. Accordingly, to understand the application of AI to jury selection, each aspect of jury selection must be understood. The primary areas of jury selection are: Pre-trial juror research; juror questionnaires; construction of attitudinal juror profiles; social media research; and oral voir dire. Each area lends itself to a various application of AI with efficient, informed, and data-based decision making the goal. Each area also faces challenges including ethics, accuracy, confidentiality, and bias. In this article, we will focus on questionnaires, social media research, and oral voir dire.

Questionnaires

Juror questionnaires are probably one of the more productive ways to leverage the advantages of AI. As noted above, the juror questionnaire process can differ depending on the jurisdiction, court, and even judge. In some scenarios lawyers have time before trial, or during a break to review questionnaires of the entire venire in detail. Other scenarios have lawyers scrambling to look at questionnaires and venire lists, at the same time a venire is seated, and as oral voir dire begins. In each of these situations, copious amounts of information must be reviewed quickly, with equally expeditious decisions made about jurors based on responses to their questions.

With the assistance of AI questionnaires can be converted in digital formats, extract valuable insights, and even initiate conversations for cause challenges.[3] The process consists of written questionnaires filled out by jurors scanned into a computer. The computer contains a program which is essentially an algorithm built to digest such information, analyze it, break it into fields, and perform searches at a speed faster than any human can operate.

It is this writer's opinion that with many applications of AI, the best results are accomplished when human understanding and preparation precedes the application of AI. For example, before using AI to digitize questionnaires, a lawyer must think about what the attitudinal profile of an ideal juror, and a poor juror would look like based on the fact pattern of a given case (AI can of course be used to perform this function, but this writer recommends a hybrid approach). Perhaps the ideal juror would possess a high internal locus of control, have a professional background involving STEM, and hold beliefs that resilience is an important character trait. Conversely, a poor juror may have an external locus of control, work in a low paid, helping profession, and believe that empathy is the most important character trait.

Following the "human thinking" component, AI can be used in a few ways. It can help form questions which elicit these traits, and it can be used during real time jury selection to digitize the questionnaires and extract patterns, and insights which help the questioner hone their oral voir dire process, as well as sift through large amounts of information to identify which jurors should be further questioned and set up for cause strikes. [4]

Social Media Research

Like juror questionnaires, another area of jury selection ripe for AI is social media research. Social media research can begin as soon as a venire list is received. Sometimes a list is received in advance of trial, more often it is obtained as oral voir dire is starting. The challenge for lawyers is to sift through lists of jurors, to uncover their social media profiles, and make quick decisions based on the information uncovered. Like questionnaires, the human portion of the work should precede turning it over to AI. The lawyer must know what they are seeking to find and use AI to find

1 https://en.wikipedia.org/wiki/Artificial_intelligence
2 https://www.aiacceleratorinstitute.com
3 https://juryanalyst.com/blog/unveiling-the-power-of-juror-questionnaires-and-ai-in-law/
4 https://juryanalyst.com/blog/unveiling-the-power-of-juror-questionnaires-and-ai-in-law/

it. For example, in a case where Republicans are deemed to be better jurors than Democrats (a measure which AI can discover), the search time using AI can take a fraction of the time to perform searches, for this information, as well as information which correlates with this information.

Selection (Deselection) of a jury at trial

Oral voir dire is often fast with the trial lawyer forced to focus on many things: scanning the venire, the jury box, making sure name pronunciation is correct, building rapport with venirepersons, while identifying those who are biased against their client. AI can simplify this multi-faceted, fast-moving process in a few ways. Like pre-trial exercises regarding construction of juror attitudinal profiles for the questionnaire process, the same process can be used, with the assistance of AI to identify best/worst jurors, and to formulate questions used to elicit responses. This assists in identification, so the lawyer knows who to question to build a cause a strike (or exercise a peremptory as necessary). AI can provide an understanding of a venirepersons personality traits to potentially predict a a person's hobbies, opinion, and attitudes. [5]

Ethical Issues: Batson and Bias

With the implementation of new technology, in a pre-existing system, there are issues of ethics, confidentiality, and accuracy. One of the guiding principles of jury selection is based on the U.S. Supreme Court case, Batson v. Kentucky which held peremptory strikes cannot be based on race. Batson has since been expanded to civil cases, as well as various protected classes. One of the ethical issues with AI is bias can be built into human constructed algorithms, and juries can inadvertently be selected using unconstitutional criteria.

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5 https://www.infotrack.com/blog/ai-jury-selection/

The Diversity and Inclusion Summit held on April 30 at the Steptoe & Johnson's Charleston office was a huge success with over fifty attendees. It was a ground-breaking event with a great deal of effort and time invested by the IDEA Committee led by Suleiman Oko-Ogua, who did most of the weightlifting, as reported by the committee. We are very thankful that DTCWV was responsible for holding this inaugural event. Thanks to everyone who participated.

L-R: Fazal Shere, Committee Chair; Jane Harkins, Teresa Dumire, Committee members; Keynote Speaker Craig Thompson; and Suleiman Oko-Ogua, Program Chair

Generative AI, Copyright, and Plagiarism: What Should Lawyers Know About Memorization

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Recent advances in artificial intelligence have opened up a new world of possibilities for all users of the technology, including lawyers. Many of these possibilities are positive, including increased efficiency for legal writers, and corresponding decreased costs for clients. There is even some excitement that these tools might help us close the access to justice gap that has long existed in law. However, artificial intelligence, and especially generative artificial intelligence, has significant potential downsides for legal users. The phenomenon of memorization, discussed below, has received less coverage in legal writing and is one potential downside lawyers should be mindful of.

At a basic level, AI is the study of training computers to do tasks we typically associate with humans, such as playing chess, driving a car, or writing a story. AI as a field of study has been around since the 1950s, and at use in the practice of law for decades as well. For example, many electronic legal databases used to perform legal research have long been powered by AI. Generative AI is a more recent advance, with the large language model (LLM) ChatGPT the most famous example. LLMs are trained using deep learning techniques on vast datasets that contain newspaper articles, books, and websites. The models can "learn" from their training data, noticing connections and patterns in human language, and then use those inferences to generate writing in response to a prompt. Given how important writing is to the practice of law, it is no surprise to see lawyers experimenting with LLM in their legal drafting work.

Many legal articles (including several by this author) already address well-known and documented issues with LLMs, including potential issues with confidentiality, bias, and their propensity to present "made up" facts (a phenomenon known as AI hallucinations). Lawyers have already faced embarrassment, sanctions, and discipline for misuse of the tools. But the issue of memorization, and the potential problems it raises for legal users of LLMs, has been less well documented.

Despite the fact that LLMs are developed to generate "new" writing in response to a prompt, research has shown that they sometimes will generate verbatim passages from their data training set. This phenomenon, known as "memorization" or "regurgitation," has been recently documented in several lawsuits brought by copyright holders against the developers of generative AI. The developers of generative AI note that memorization is a "bug" not a "feature," that the examples produced in the lawsuits against them are a result of "hacking" their systems, and that they are actively working on technical fixes that will prevent LLMs from producing verbatim passages from their training data.

But until a reliable fix for the memorization problem is developed, lawyers and other users need to be aware of the possibility that LLM outputs may include a literal copy of someone else's copyrighted work. To spare themselves the embarrassment of being disciplined for "plagiarizing," not to mention potential copyright headaches, lawyers should proceed with caution. Lawyers always have a duty to supervise any assistance they receive from nonlawyers, and generative AI is no exception to that rule.

Four Tips For Using AI in Your Civil Defense Practice

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Although it seems Artificial Intelligence ("AI") is the topic of the year in the legal community, many attorneys are still reluctant to try it. As many experts in this field remind us, AI is a starting point—not a direct path to the finished product. With the technology currently available, AI is a great place to start brainstorming, for example, or it can be used as a tool improve your first draft.

Before getting started, it is important to remember that AI learns from the information provided to it. Therefore, do not provide any confidential or proprietary information when inputting your prompts or requests. However, if you can generalize case concepts, questions and issues, AI can generate substantive work for your cases. Most AI models do not actively search the internet for information; therefore, the responses will necessarily only be as up-to-date as the data set and may have a bias from the information provided.

With that very basic preface, this article is not intended to be a scholarly article on AI, but a practical piece to nudge practitioners to give AI a try. To get started, here are five tips to use your AI model of choice (i.e., ChatGPT, Claude, or others) to improve your practice.

1. Improve Deposition Outlines

While we typically have a strong outline from a prior case to use as a starting point, AI can offer additional ideas for categories of questions or specific questions targeted toward the unique facts of your current case. For example, in ChatGPT try asking it to draft questions by giving it a detailed—and of course non-confidential—prompt. Here's an example: "In a product liability case involving an alleged airbag deployment malfunction, prepare questions to ask the plaintiff during a deposition."

ChatGPT will prepare a line of questions and, in my experience, the questions produced are good basic questions that explore before and after the accident, details of the vehicle, and some basic damages questions. However, by following up with a request to prepare 50 additional questions focusing on any maintenance, prior accidents or vehicle problems and warning lights, ChatGPT will prepare another more focused line of questioning. You can continue to ask it to prepare more questions either on different topics or on the same topic until it runs out of questions. Within a matter of minutes, ChatGPT can generate hundreds of potential questions for you to consider incorporating into your deposition.

2. Improve Written Discovery

Similarly, if you have standard sets of written discovery that you tailor to each case, consider asking AI to draft questions by giving it a prompt of the topic. A sample prompt may be, "Prepare requests for production of documents related to damages in a construction defect case." While this is a simple prompt, you can provide more detail and give greater confines to the questions as well. Follow-up by asking it for 20 more questions. This same application can be used for preparation of direct- and cross-examinations for trial.

3. Brainstorming

Whether you are looking for additional affirmative defenses to include in the Answer, defense themes for the case, potential motions *in limine*, categories for a 30(b) corporate representative or marketing angles for clients, AI can offer a multitude of ideas in a matter of minutes. While the examples provided in this article are simple, one-line prompts, you can provide as much detail and context for the question as needed. The additional information will help generate more specific responses that can really save you time, brain space, and ultimately help you produce a well-rounded and accurate end result.

4. Feedback on Motions and Briefs

Understanding the caveat not to disclose confidential or proprietary information, by copying and pasting your motion or brief into ChatGPT or another chatbot, you'll receive feedback on structure, clarity, strength of arguments and some suggestions to improve the motion. You can also ask the chatbot to proofread and find any typos, and it will generate a list of items to review. Again, the most value comes from the follow-up questions. For instance – "Is there an argument that could be strengthened?"

While AI can generate valuable insights and suggestions, it should not replace human judgment and legal expertise. And like so many tools, AI is only as good as the user. But taking the time to learn how to draft prompts and utilize AI is worth the effort. Part of that skill set will be not only understanding what AI can do for lawyers, but also recognizing limitations of these models and chatbots, so we can use them effectively and appropriately to assist our clients. If you have not created an account and started experimenting with AI in your daily practice, hopefully this article *prompts* you to give it a try. Pun fully intended.

Climbing the Ladder

Peggy L. Schultz, *DTCWV Executive Director*

Every firm and organization says to "get involved" if you want to advance upward. Easy to say, hard to do. Today's world has us all committed in ways we never dreamed of a few years ago. I'm not telling you anything new. This is from the young attorney to the senior attorney. But there is time if you just say "I am going to do it." You must set your goals for your career and figure out how to *Climb That Ladder*. If you do this, you will build a successful practice as it is all about taking the time to build relationships. You can build relationships and your Book of Business starting with other attorneys in the state through DTCWV and getting yourself "known."

Some of the best ways to start moving upward and building those relationships are:

1. Chair a committee. We have eleven substantive committees. There is certainly room for you to be on one of these. This is one of the best places to start serving DTCWV to advance to the Board of Governors.

2. With any organization you belong to, make sure your profile is fully completed on their website. DTCWV and others offer free marketing for you. You scurry to get on Linkedin, Facebook or whatever social media platform is out there but the one place they might look for you first is on the website of your state's civil defense organization. A blank profile does you no good.

3. Choose topics in your practice area, research and become more knowledgeable than other attorneys to become a "go-to" person for advice. Then provide webinars for DTCWV and other groups. Next thing you know, you will be on a circuit to make presentations. Great way to develop your referral base and obtain work.

4. Write an article for The WV Defender. We are constantly looking for authors for The WV Defender. We share these publications with the judges and post on the website for years to come. People do look at them to obtain information long after publication. I know. I get requests to help find certain articles.

5. Write an article for the annual meeting Litigation Digest. Here again, these are placed onto the website in the Member Section after the meeting for members to refer to for years.

6. Volunteer for the Amicus Committee. We have one of the best Amicus Committee's in the country. I know. I have a relationship with most all state civil defense organization Executive Directors around the country which allows me to hear what they are doing. West Virginia is a star. Be a part of the Committee.

7. Last on my list to help Build Your Book of Business to Climb the Ladder has nothing to do with DTCWV but just helping you be successful. I am sure you are on several social media platforms which is great. We give "shout outs" and "likes" and detail success stories. But when it comes down to it, people still love to receive that hand-written personal note from you with a "thank you" or a remembrance of something. It's old fashion maybe but it shows you actually took the time to write and mail.

Beyond Boundaries:
How AI is Poised to Change Healthcare and Challenge Healthcare Law

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Historically, the law has grappled with technological advancements in a reactive way, often lagging far behind innovation. As Oliver Wendell Holmes Jr. aptly noted in his treatise *The Common Law*, "the life of the law has not been logic but experience." Unfortunately, this means that it can be difficult to anticipate the effects of a new technology and analyze the burden of precaution with respect to its inherent risks until experience has taught us what those risks will be. This principle rings especially true in the context of technological advancements such as AI, where the rapid pace of development and its broad implications for social change can leave lawmakers uncertain about the precise risks to be avoided and how best to create policy and draft laws. The magnitude of potential benefits of AI call for a cautious and agile approach to new regulatory frameworks that will both mitigate potential risks while also permitting innovation to flourish and confer the benefits of the technology.

The most recent breakthroughs in the AI space involve "deep learning" or "unsupervised" learning models based upon new kinds of computer architecture called "neural networks" whose design is inspired by the human brain. Deep learning neural networks differ from their predecessors in that deep learning AI models are comparatively "unsupervised." In prior AI models, an AI algorithm was fed large amounts of data, and then trained through human interaction to recognize patterns, sort data, and obtain results. A good example is a model that can differentiate a stop sign from a bicycle based upon thousands of internet prompts that ask a user to "prove you are not a robot." Deep learning models, such as the large language models and general adversarial networks used to create OpenAI's ChatGPT, do not require as much human training. Instead, they are fed huge amounts of data, and can somehow learn to extrapolate new information and patterns from the data with much less human interaction than before. This new technology, and its surprisingly intelligent results, appears ready to revolutionize human thinking itself.

As AI technologies evolve, and their implementation becomes more commonplace, they pose unique opportunities and challenges within the healthcare sector. There are already multiple AI based platforms that can listen to doctor/patient interactions and generate clinical notes from the visit, including suspected diagnoses, and recommendations. Early reports are that these tools can significantly reduce the time doctors spend on these administrative tasks, reducing physician burnout and improving patient care. Also, AI's potential as a tool to analyze medical images and tissue samples is extremely promising. Studies have shown that AI models can be as or more effective than humans at (1) detecting certain types of retinal disease, (2) predicting and detecting types of cancers based upon imaging or simple patient history, (3) detecting cardiac conditions using an "AI stethoscope," (4) predicting the risk of future heart attacks based upon retinal images and images of inflamed arteries, and many other promising disease detection scenarios. These technologies will revolutionize the way we screen for and prevent hundreds of common illnesses. As of January of this year, the FDA had approved over 700 AI algorithms, over 400 of which pertain to medical imaging. Also, in a breakthrough example of the benefits of AI, late last year researchers at Harvard and MIT used a deep learning neural network to analyze thousands of chemical substructures for their effectiveness as an antibiotic – a task that would have been monumental if undertaken by by human "brute force." The result? The AI discovered a new class of antibiotic (the classes of antibiotics have been essentially static for the last 40 years) that they believe will combat MRSA, which kills over 10,000 people every year, in the United States alone.

Clearly, from patient documentation and image analysis to revenue cycle management, AI is revolutionizing patient care and operational efficiency. Its potential appears staggering. However, this innovation also introduces complex legal considerations related to competency and accuracy, privacy, inherent bias, transparency, and accountability, and calls for a reevaluation of existing legal frameworks and regulatory measures. Legislatively, the National Artificial Intelligence Initiative Act of 2020 reflects Congress' efforts to coordinate AI research and development, ensure U.S. leadership, and prepare the workforce for AI integration. However, on the federal level, most of the action is happening in the Executive branch. The Executive Orders ("EO") issued by recent U.S. administrations pertaining to AI include the Trump Administration's EO 13859 and the Biden Administration's comprehensive EO 14110. These Executive Orders reflect the United States' commitment to understanding and monitoring the risks associated with AI, and promoting its safe, secure, and trustworthy use in government and healthcare. These orders establish guiding principles, require inventory of AI use cases, and enhance AI implementation expertise. Moreover, they focus on addressing risks related to AI adoption concerning the need for human oversight of systems and results, data privacy, inherent bias and discrimination, as well as the need to foster innovation, competition, and worker support.

On the healthcare front, EO 14110 commands the Secretary of Health and Human Services to, by certain dates, establish an AI Task Force, develop a Strategic Plan on responsible deployment of AI, develop a quality strategy to determine whether AI-enabled technologies in the health and human services sector maintain appropriate levels of quality, advance

nondiscrimination compliance, establish an AI safety program, and develop a strategy for regulating use of AI in drug development. Many of these initiatives and guiding principles have been or are being implemented today. For example, the Center for Medicare Services is now requiring Medicare Advantage organizations to ensure that they are making medical necessity determinations based on the circumstances of the specific individual, as opposed to using an algorithm. Centers for Disease Control and Prevention is developing a strategy to employ AI and natural language processing to estimate US suicide fatalities, combat the opioid epidemic, respond to disease outbreaks, and more.

As AI continues to reshape the landscape of healthcare, lawmakers and stakeholders must engage in continuous dialogue, research, and collaboration to address the emerging challenges and harness the potential of AI to improve patient care while upholding the principles of justice and equity. The journey ahead is fraught with uncertainties, but with proactive and informed legal guidance, the healthcare industry can navigate the AI revolution with confidence and integrity.

REGISTRATION FORM

42nd Annual Meeting • June 9, 10, 11 & 12, 2024
Marriott Myrtle Beach Resort Grande Dunes

Please complete and return with payment to:
Peggy Schultz, Executive Director, DTCWV
P.O. Box 527, Charleston, WV 25322
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ATTENDEE / GUEST INFORMATION

Name (print):_____ Badge Name:_____

Spouse/Guest Name:_____ Badge Name:_____

Children/Age:_____

Firm:_____

Address:_____

City:_____ State:_____ Zip Code:_____

Email:_____ Telephone:_____

Registration fee includes all CLE Seminars, Speaker Handouts, President's Welcome Reception, Breakfasts, Breaks, Wednesday Reception /Dinner, Friday Lunch, DTCWV Litigation Digest, Member Gift, Two Beverage Tickets for Monday Pool Bar, Two Beverage Tickets for Tuesday Banquet Once Dinner Begins.

REGISTRATION AND FEES (CHECK ALL THAT APPLY)

Refunds available (less $60 handling fee) up to May 15 • **Late Registration:** After May 15, add $50

❑ Attorney Member ($450)

❑ Attorney Non-Member ($550)

❑ Legal Assistant ($100)

❑ Legal Assistant Non-Member ($200)

❑ Spouse/Guest Fee for Receptions/Banquet ($140)

❑ Children: 13 & older (Receptions/Dinner) ($50)
Children Under 13: No Charge

❑ Golf: Pete Dye Course, Barefoot Landing............$135
(Cart, Green Fees, Lunch, Prizes)

Handicap:_____

Playing:_____

Additional Player Name:_____

Additional Player Handicap:_____

Please make check payable to DTCWV   Enclosed is $_____

*For headcount purposes, **please check below** if you plan to attend. If you make reservations and discover you cannot attend by **May 30**, please let the DTCWV office know by calling 304-552-7794 or emailing pshultz@dtcwv.org*

DINNER & RECEPTION ATTENDANCE

I plan to attend the Wednesday President's Welcome Reception   _____ # Guest_____

I plan to attend the Tuesday Main Reception/Dinner   _____ # Guest_____ # Children_____

ADDITIONAL INFORMATION

❑ Past President, Year_____   DTCWV will pay to apply for credit in states for which it receives 3 or more requests.

❑ First Time Attendee   ❑ Other states in which you need CLE credits _____

❑ Young Lawyer

❑ WV Bar #_____   ❑ Other states in which you need CLE credits _____

❑ Do you or your guests have any special dietary needs?_____ Explain_____

Revolutionizing Presentation Strategies with AI: A Legal Perspective

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In contemporary legal practice, the ability to convey persuasive arguments is paramount. With the advent of Artificial Intelligence (AI), new avenues for enhancing presentation strategies in the area of Appellate Advocacy have emerged, particularly in crafting compelling legal narratives, refining oral arguments, and optimizing brief writing. This article explores how AI tools are revolutionizing these aspects of legal practice, examines techniques for their implementation, and discusses the ethical and legal considerations that accompany their use.

In the rapidly evolving landscape of legal practice, the traditional methods of presenting cases and arguments are undergoing a profound transformation, largely due to the integration of AI technologies. Historically, lawyers have relied on meticulous research, careful analysis, and persuasive rhetoric to advance their clients' interests in courtrooms. However, the capabilities of AI now offer unprecedented opportunities to augment these strategies and achieve even greater levels of success.

Crafting compelling legal narratives is a cornerstone of effective advocacy, requiring attorneys to distill complex legal concepts and factual scenarios into coherent and persuasive stories. This process has been labor-intensive and time-consuming, often involving extensive document review, case analysis, and narrative development. Extensive review of the record below, combined with legal research both in the jurisdiction as well as those jurisdictions that may prove persuasive has been the hallmark of the world of the appellate lawyers.

Now, AI tools, particularly those leveraging Natural Language Processing (NLP) and sentiment analysis, have revolutionized the narrative crafting process. By swiftly analyzing vast amounts of legal documents, court opinions, and related materials, AI algorithms can identify key themes, trends, and arguments, allowing attorneys to craft more nuanced and compelling narratives.

The use of sentiment analysis tools can analyze the emotional tone of written and spoken content, helping attorneys tailor their narratives to resonate with judges, juries, and other stakeholders. Sentiment analysis is the process of analyzing digital text to determine if the emotional tone of the message is positive, negative, or neutral. Examples of this AI technology is found in products from most major law firm research companies.

The emerging trend is that of enhancing oral arguments with AI. Oral advocacy is a fundamental skill for attorneys, requiring the ability to articulate complex legal principles, persuade skeptical audiences, and respond adeptly to opposing arguments. Traditionally, attorneys have honed these skills through rigorous practice, mock trials and arguments , and courtroom experience. AI technologies offer a range of tools and techniques to enhance oral arguments and advocacy skills. Speech recognition technology, for example, allows attorneys to record and transcribe their oral arguments, enabling them to analyze their delivery, identify areas for improvement, and refine their presentation style. Utilizing AI chatbots to then review the transcription of an argument can lead to more concise and convincing verbiage recommendations.

AI-powered content generation tools can assist attorneys in structuring their oral arguments more effectively, ensuring that key points are articulated clearly and persuasively. Moreover, virtual reality simulations provide a realistic courtroom environment in which attorneys can practice and refine their advocacy skills, preparing them for the rigors of litigation.

All of this seems to be forecasting into the future. Just imagine the possibilities….in a complex appellate case, attorneys could utilize AI-powered speech recognition and analysis tools to refine their oral arguments, resulting in a compelling presentation that is more persuasive to the appellate court. Predictive analytics tools leverage AI algorithms to assess the potential outcomes of legal arguments, helping attorneys anticipate opposing counsel's strategies and tailor their briefs accordingly. Additionally, grammar and style checkers can improve the clarity and readability of briefs, ensuring that arguments are presented in a compelling and persuasive manner.

While AI technologies offer significant benefits in enhancing presentation strategies, they also raise important ethical and legal considerations. One concern is the potential for bias in AI algorithms, which may inadvertently reinforce existing inequalities or prejudices in the legal system. Attorneys must ensure that AI tools are used ethically and responsibly. The future will determine issues involving transparency regarding the data sources and methodologies employed.

Additionally, attorneys must ensure that their use of AI technologies complies with relevant laws, regulations, and ethical guidelines, including those governing attorney competence, confidentiality, and conflicts of interest.

Although the future is still not clear, what we do know is that the integration of AI into presentation strategies represents a paradigm shift in legal practice, offering unprecedented opportunities to enhance advocacy and

achieve favorable outcomes for clients. As AI technologies continue to evolve, the possibilities for innovation in presentation strategies are virtually limitless. It is essential for legal professionals to embrace AI as a powerful tool for enhancing their effectiveness and efficiency. By leveraging AI technologies thoughtfully and responsibly, attorneys can elevate their presentation strategies to new heights, ultimately advancing the cause of justice in an increasingly complex and dynamic legal landscape.   AI technologies have the potential to revolutionize presentation strategies in legal practice, empowering attorneys to craft more compelling narratives, deliver more persuasive oral arguments, and produce higher-quality briefs.   By embracing AI as a transformative force in legal advocacy, attorneys can harness its capabilities to achieve greater success for their clients and advance the cause of justice.

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Artificial Turns Official:
Regulating Lawyers in the Dawn of AI

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Lawyers need not dig too deeply through their inboxes to find that AI is a dominant topic in legal literature. What began relatively recently as somewhat of a curiosity has swelled to absorb legal conference and continuing legal education agendas, and regulatory bodies from across the governmental gamut are poised to develop new or amend existing rules to accommodate the increasingly important role that AI and will occupy in our daily lives.

For West Virginia lawyers, the road to regulating AI appears to be branching along parallel paths in (a) the Legislature, (b) the Office of Lawyer Disciplinary Counsel, and (c) the Judicial Investigation Commission. This article seeks to provide an overview of each effort and the most immediate effects they may prove upon the practice of law.

(a) Legislative Efforts to Regulate AI

The West Virginia Legislature has shown increasing interest in addressing AI over the past few sessions, and the House of Delegates in particular recently established a select committee on the subject in advance of the 2024 Regular Legislative Session.[1] Although the Committee was not particularly productive from a legislative standpoint—passing just one bill that went on to become law—its work was notable for the significance of the bill it did pass and the subject matter it considered elsewhere during the session.

First, the Committee originated a bill to establish the West Virginia Task Force on Artificial Intelligence.[2] The bill passed both the House and Senate without amendment, and Governor Justice signed it on March 27, 2024. The bill provides that the Task Force will be comprised of state legislators, executive officials, and designated private sector representatives, who are in turn tasked with developing policies and proposing legislation to regulate AI in West Virginia for both private and public purposes. The Task Force is required to submit a report to the Governor and the Legislature covering its findings and recommendations by July 1, 2025, at which time the Task Force will terminate unless extended.

Notably, the 2025 Regular Legislative Session will have reached sine die by the time the Task Force's report is due, but other items it considered in 2024 may portend its next efforts: the Committee favorably reported legislation that would authorize the Secretary of State to create a digital wallet infrastructure for business licenses and certifications,[3] clarify that AI infrastructure be taxed at scrap value as a "specialized high-technology purpose" for ad valorem tax,[4] and prohibit certain uses of deep fake images.[5] The House passed every bill the Committee favorably reported, but all but the Task Force bill died in their respective Senate committees.[6]

Finally, the Committee invited and heard from an impressive array of guest speakers including WVU Law Professor Amy Beth Cyphert, who developed and instructs a course called "Artificial Intelligence and the Law," Olivia Jiminez, who serves as Chief of Staff for the Center on AI Policy, and representatives from major technology firms such as Microsoft and Alpha Technologies.[7]

(b) Judicial Investigation Commission's Ethics Opinion

On October 13, 2023, the West Virginia Judicial Investigation Commission published an advisory opinion from retired Judge Alan Moats[8] that addresses three specific questions regarding judicial applications for AI:

(1) Can judges use AI to perform legal research and to draft documents such as orders and opinions?
(2) Can judges use AI to reach decisions in cases?
(3) Are there other ethical considerations a judge should consider before using AI?[9]

After setting forth and briefly discussing the relevant rules of judicial ethics, Judge Moats began his analysis with a poignant assessment of the role AI already plays in our daily lives:

> Whether you realize it or not, you already use some form of artificial intelligence in your everyday life: facial recognition on your cell phone; smart email categorization; suggestions from Facebook of new friends; recommendations for what to watch on streaming apps; and navigation sites such as Google

1 *See* H.R. 3, 2024 Reg. Sess. (W. Va. 2024).
2 *See* H.B. 5690, 2024 Reg. Sess. (W. Va. 2024).
3 *See* H.B. 5161, 2024 Reg. Sess. (W. Va. 2024).
4 *See* H.B. 5443, 2024 Reg. Sess. (W. Va. 2024).
5 *See* H.B. 5516, 2024 Reg. Sess. (W. Va. 2024).
6 *See* https://www.wvlegislature.gov/Bill_Status/bills_reported_com.cfm?year=2024&sessiontype=RS&btype=bill.
7 *See generally* Agendas, House Select Committee on Artificial Intelligence, 2024 Reg. Sess. https://www.wvlegislature.gov/committees/house/HouseCommittee.cfm?Chart=ai.
8 Judge Moats served as a temporary justice of the Supreme Court of Appeals from February 2022 through April 2022.
9 *See* Letter from Alan D. Moats, Judicial Investigation Commission, to [REDACTED], *JIC Advisory Opinion 2023-22*, Oct. 13, 2023, https://www.courtswv.gov/sites/default/pubfilesmnt/2023-11/JIC%20Advisory%20Opinion%202023-22_Redacted.pdf.

Maps. The list is endless. AI has even taken hold within the legal community. In April 2023, it was announced that GPT-4, an AI component, took and passed all parts of the Uniform Bar Exam. The pass rate was in the 90th percentile. Legal search engines like Westlaw, LexisNexis or Casetext use AI to let lawyers find more relevant case law for their briefs or correct case cites. The use of E-discovery is just another example of AI encroachment in the law.[10]

Judge Moats went on to apply the more generalized principles set forth in the Code of Judicial Conduct (*i.e.*, acting in a manner that promotes public confidence and exhibiting impartiality and diligence) to the specific questions to which he was responding:

(1)   Of course judges can (and already do) use AI as a tool like any other; but
(2)   "A judge should **NEVER** use AI to reach a conclusion on the outcome of a case," and
(3)   Judges must be vigilant to ensure that their use of AI does not jeopardize other ethical obligations such as confidentiality and candor.[11]

In summarizing his analysis, Judge Moats analogizes a judge's use of AI to the manner in which judges utilize their law clerks:

> Importantly, the law clerk never decides the case. The judge alone is responsible for determining the outcome of all proceedings. At the end of the day if the judge somehow violates the Code of Judicial Conduct in reaching a conclusion on the case, he/she cannot say, "the law clerk made me do it" nor can he/she say, "AI made me do it." The responsibility for the finished product rests solely with the judge. Therefore, just as a judge would do with a law clerk's work, he/she must check the final draft of any written decision to make sure it contains the most current case law and is error free.[12]

(c) Lawyer Disciplinary Board's Draft Ethics Opinion

Finally, the West Virginia Office of Lawyer Disciplinary Counsel's Lawyer Disciplinary Board has instituted an Artificial Intelligence Committee, which in turn recently published a draft legal ethics opinion on AI.[13]

The draft opinion largely tracks Judge Moats' analysis in the judicial context, noting in particular that "[l]awyers use AI and generative AI without even realizing it" and that lawyers must "take care to exercise independent judgment . . . maintain client confidentiality, and supervise their work performed by AI."[14]

Arguably, though, the draft opinion goes a step further, suggesting that <u>lawyers may be ethically obligated to use AI</u>: "A refusal to use technology that makes legal work more accurate and efficient may be considered a refusal to provide competent legal representation to clients . . . lawyers should have a basic understanding of the AI programs that may best benefit their client and their practice." [15]

The draft opinion also suggests that <u>lawyers may be required to discuss AI with prospective clients whether the lawyer intends to use AI or not</u>: "A lawyer should obtain approval from the client before using AI . . . In certain circumstances, a lawyer's decision not to use AI also may need to be communicated to the client particularly, if using AI would benefit the client."[16]

(d) So, where does that leave us?

It is impossible to predict whether the Task Force on Artificial Intelligence will make any legislative recommendations regarding the legal community, much less what those recommendations may look like or whether the Legislature adopts them. And as one might expect, the legal community has been slow to respond to growing concerns about AI's effect on the practice of law. Indeed, the Center of Judicial Ethics of the National Center for State Courts suggests that Judge Moats' ethics opinion is the first of its kind.[17]

But as Judge Moats's opinion suggests, and the Lawyer Disciplinary Board's draft opinion reiterates, lawyers and judges alike must at all times be guided by their respective ethical obligations. Both sets of obligations expressly include a duty to stay apprised of technological developments and to use independent professional judgment when implementing new technologies in their practice.

Importantly, the Lawyers Disciplinary Board's draft opinion suggests that lawyers may soon incur additional obligations regarding AI, including a requirement that lawyers discuss its potentialities at the outset of representation. Given the wide variety of AI tools most lawyers already use on a daily basis—whether wittingly or otherwise—it is incumbent upon our community to familiarize ourselves with what AI tools we already use and to stay apprised of developments moving forward.

Note, The Lawyer Disciplinary Board is accepting public comments on its draft opinion in writing only to the Artificial Intelligence Committee, 4700 MacCorkle Avenue SE, Suite 1200, Charleston, WV 25304 through May 1, 2024.

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10 *Id.* (cleaned up).
11 *Id.* (emphasis in original).
12 *Id.*
13 *See* Draft Legal Ethics Opinion 24-01, *Artificial Intelligence*, https://files.constantcontact.com/75edd16b001/db6ae758-78c8-41e3-93aa-cd57c1caeb03.pdf.
14 *Id.* at 2.
15 *Id.* at 3.
16 *Id.* at 4.
17 *See* Judicial Ethics and Discipline, *Artificial Intelligent and Judicial Ethics*, Nov. 7, 2023, https://ncscjudicialethicsblog.org/2023/11/07/artificial-intelligence-and-judicial-ethics/.

The Impact of Artificial Intelligence on the Defense Lawyer

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Technological advancements in the legal profession are developing so quickly that it is hard to keep up. But no technological development is so potentially disruptive as Artificial Intelligence. As computers learn to do more than just process large amounts of data quickly, and progress to reasoned decision-making based on data analysis, the potential for revolutionary change in how we work is evident.

If you are a customer of Amazon, you are subject to their AI commerce platform every time you log onto their website. The Amazon system is designed to learn your buying preferences and present you with options consistent with your prior buying decisions. Likewise, Facebook uses an AI interface that presents paid ads on your timeline taken from the subjects of your search engine entries. If you search for information on desktop printers, voila! An ad for a printer will appear in your Facebook timeline. This is AI.

With the release of ChatGPT in November 2022, an easy-to-use AI tool was available on the web or on your phone. This "open-source" tool (usable without a license) is not designed for lawyers but can perform many important tasks that will make lawyers' jobs easier. Imagine summarizing depositions in seconds instead of hours, drafting basic correspondence almost instantaneously, compiling timelines in under a minute, or summarizing medical records with a few clicks of a keyboard.

But functionality at your fingertips comes with some risks. As an open-source tool, ChatGPT is not secure, confidential, or protected from public use. Like all AI tools, its ability to reason is based on analysis of an enormous amount of data which is in the public domain. If you ask ChatGPT to incorporate analysis of confidential client information (like plaintiff's medical records), that data becomes part of the set that ChatGPT will use to answer future questions. So, it is critical for lawyers to understand that confidential client or case information should *never* be used in an open-source AI tool. Only use confidential information with AI products where you own a license (like AI packages from Westlaw or Lexis/Nexis).

The implications for the civil defense lawyer are dramatic. The old days of an associate researching a legal question and preparing a memorandum for the partner will be too costly. AI legal research tools can answer questions in seconds that in the past would take days of research and writing. Additionally, the work that paraprofessionals traditionally performed can now be done by machines. The economic model of leverage that maximizes the profitability of civil defense practice is in danger. Going forward, lawyers will be faced with the dilemma of how to price client work that is done by machine. This will put further stress on the viability of the billable hour.

Understanding the revolutionary potential of AI is critical for lawyers in civil defense practices. Not since the advent of the internet has there been a technology addition that has so much potential to change the way we practice law. The lawyers who engage this new tool and learn how to use it will have a competitive advantage.

BENEFITS OF MEMBERSHIP

Networking

Expand your personal network by meeting defense attorneys from all over West Virginia. Grow your potential referral network and grow your book of business.

Substantive Law Committees

Membership in DTCWV allows involvement and sharing of information within the various Substantive Law Committees. These Committees are free to join with your membership and include:

- Business/Commercial Law Committee
- Creditor's Rights
- Construction Law /Safety & Health Committee
- Employment Law
- Energy Law Committee
- Governmental Liability
- In-House Counsel
- Insurance Law
- Medical Liability
- Product Liability Committee
- Workers' Compensation Committee

Substantive Law Committees add great value to your membership through their individual committee email chatter, asking and answering questions to help gather particular information during case prep, latest court rulings, actions by a judge, etc.

Amicus Committee

DTCWV's Amicus Committee reviews requests for amicus support and makes recommendations to the Board of Governors as to whether the organization should add its voice on issues of importance to the West Virginia defense bar and the civil justice system more generally. In instances where the Board authorizes the submission of a brief, volunteers within the Amicus Committee prepare the filing. These amicus briefs are written free of charge.

IDEA Committee

Our IDEA Committee is committed to promoting diversity, inclusion, and equality. As a core value, and in pursuit of its organizational mission objectives, DTCWV celebrates and welcomes individual differences, including unique backgrounds, perspectives, experiences, and talents, which allow the organization to provide optimal programming and services to its membership.

The committee holds regular meetings and plans a variety of activities.

Lobbyist

We have representation and a voice during legislative sessions by a lobbyist. This helps to keep the DTCWV Board and our members up-to-date on issues related to the civil defense profession, allowing us speak collectively when necessary.

Quarterly Newsletter & E-Mail Blasts

Stay up-to-date on West Virginia with our electronic newsletter "DTC Docket." Our newsletter is produced quarterly to provide members more insight into the activities of the organization, membership activities, CLE opportunities, firm updates, events, industry news and any other news of interest to our members. In addition, you can opt-in to a wildly successful e-mail list for update on case law from the West Virginia Supreme Court of Appeals, United States Supreme Court, 4th Circuit, and the Southern District and Northern Districts of West Virginia.

Young Lawyer Committee

The DTCWV Young Lawyer program is one of the most active in the country. There are quarterly lunchtime meetings held with at least one being a CLE. They prepare the annual Young Lawyer one-day seminar, provide writing opportunities for the *WV Defender*, Litigation Digest and speaking opportunities to help build their resume.

Expert Witness Search

Our Expert Witness Search allows DTCWV members to poll DTCWV membership for information on expert witnesses. Free of charge.

Additional CLE

- Annual Meeting Program
- Monthly Free Webinars
- Substantive Committee Lunchtime Webinars
- Women in the Law Committee Initiatives
- Alternating Years:
  - Deposition Boot Camp
  - Trial Academy
  - Expert Witness Seminar
  - Discovery Seminar
- Young Lawyer Lunchtime Meetings
- Periodical Managing Partner Seminars

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DTCWV can be found on the following social media platforms. Join today!

Twitter: @DefenseDTCWV

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LinkedIn: Find the DTCWV by doing a search from your personal profile.

Social Events

- Charleston Member and Summer Law Clerk Social
- Morgantown Member and Summer Law Clerk Social
- Women In the Law Luncheons around the state

DTCWV'S MISSION – JOIN US!

To bring together attorneys who defend individuals and corporations in civil litigation for the purposes of elevating the standards of West Virginia trial practice; supporting and advocating for the improvement of the adversary system of jurisprudence; and increasing the quality of services rendered by the legal profession to the citizens of West Virginia.