

Estate Planning

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Artificial Intelligence and the Estate Planner

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Studies[®]

Introduction

Artificial intelligence (AI) is rapidly being incorporated into estate planning practices. AI products can increase the speed by which you draft, review, and summarize wills, trusts, other estate-related documents, pleadings, briefs, and client communications. Likewise, the speed by which you can conduct legal and financial research is faster than ever. AI may organize the tasks needed for an estate administration, from initial filing to final accounting. Fiduciary investment decisions may also be enhanced by the use of AI.

Despite the potentially amazing benefits that await you for incorporating artificial intelligence into your estate planning practice, you may be thinking “I’d rather not” just like a potential date responded to the author’s dinner and movie invitations back in his law school days. After summarizing the benefits of using AI, this Study explains that this type of response is not an option in today’s world; resistance to the coming of AI is futile.² The Study then turns to a detailed analysis of the ethical concerns that generative AI raises and provides recommendations to harness the power of generative AI to your benefit.

Potential uses of AI in estate planning practice.

Obtaining competency with AI.

Confidentiality concerns when using AI.

Client consent to use of AI.

Informing the court of use of AI.

Training and supervising staff.

AI’s impact on billing.

Advertising use of AI.

Other AI warnings.

Use of AI in an Estate Planning Practice

Automated Drafting

AI can increase the speed and accuracy of document drafting far beyond traditional document assembly programs. These documents include not just the traditional estate documents such as wills, trusts, and powers of attorney, but also pleadings, briefs, and client communications. Accuracy may also be enhanced as the AI can act as a super proofreader identifying inconsistencies and failure to meet specified requirements in addition to mere spelling and grammatical errors.



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Document Analysis

AI can review hundreds or thousands of documents at amazing speed compared to an attorney doing so by hand. This AI talent allows documents to be analyzed and located when revisions are needed due to the change of tax or other laws. The AI can also identify inconsistencies and provide summaries.

Predictive Analysis and Decision Support

AI can quickly provide predictions of different outcomes using different tax or investment strategies. This will allow attorneys and clients to make more informed decisions about which approach to take which has the greatest potential of maximizing favorable results.

Automation of Estate and Trust Administration

The AI can organize the steps for an estate administration from initial filing to final accounting. For example, the AI can create pleadings, give notices to creditors, beneficiaries, and heirs, render accountings, value assets, and prepare tax returns. In the trust contest, the AI can assist with things such as making investment decisions, reminding when trust distributions are needed, and advising the appropriate time to make GRAT payments.

Client Onboarding

AI driven chatbots can streamline the process of onboarding new clients by gathering the information needed for the initial interview. Traditional questionnaires are tedious to complete and either ask irrelevant questions (e.g., about the client's spouse or children when the client is unmarried or child-free) or fail to ask relevant questions (e.g., ownership of NFTs or Metaverse assets). The AI chatbot can determine the appropriate questions to ask based on the client's prior answers. Clients may thus be more likely to use the chatbot than complete a regular questionnaire. In addition, the chatbot can be designed to address frequently asked questions which may help inform the client about the estate planning process.

Competency

Comment 8 to the Model Professional Rule of Conduct states that "[a] lawyer should keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology."³ According to this rule, you have an obligation to yourself, your clients, and the profession to become acquainted with and proficient with the use of AI in your estate planning practice. In addition, the American Bar Association's formal opinion addressing the use of artificial intelligence in the practice of law explains that:

[t]o competently use a GAI tool in a client representation, lawyers need not become GAI experts. Rather, lawyers must have a reasonable understanding of the capabilities and limitations of the specific GAI technology that the lawyer might use. This means that lawyers should either acquire a reasonable understanding of the benefits and risks of the GAI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations. This is not a static undertaking. Given the fast-paced evolution of GAI tools, technological competence presupposes that lawyers remain vigilant about the tools' benefits and risks. Although there is no single right way to keep up with GAI developments, lawyers should consider reading about GAI tools targeted at the legal profession, attending relevant continuing legal education programs, and, as noted above, consulting others who are proficient in GAI technology.⁴

The State Bar of California provided the following summary of the duties of competence and diligence an attorney should follow when using AI:

Before using generative AI, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable terms of use and other policies governing the use and exploitation of client data by the product.

Overreliance on AI tools is inconsistent with the active practice of law and application of trained judgment by the lawyer.

AI-generated outputs can be used as a starting point but must be carefully scrutinized. They should be critically analyzed for accuracy and bias, supplemented, and improved, if necessary. A lawyer must critically review, validate, and correct both the input and the output of generative AI to ensure the content accurately reflects and supports the interests and priorities of the client in the matter at hand, including as part of advocacy for the client. The duty of competence requires more than the mere detection and elimination of false AI-generated results.

A lawyer's professional judgment cannot be delegated to generative AI and remains the lawyer's responsibility at all times. A lawyer should take steps to avoid over-reliance on generative AI to such a degree that it hinders critical attorney analysis fostered by traditional research and writing. For example, a lawyer may supplement any

AI-generated research with human-performed research and supplement any AI-generated argument with critical, human-performed analysis and review of authorities.⁵

Perhaps the biggest risk of using AI is the tendency of many AIs to “hallucinate,” that is, to provide results which sound authoritative but are actually made up “out of whole cloth.” The case of Steven Schwartz is instructive. He used ChatGPT to find case law to support his case. ChatGPT provided case names, citations, and quotations which favored his position. He then used them in briefs to the court. However, none of the cases, citations, or quotations actually existed. He and his firm were later sanctioned for \$5,000.⁶ Likewise, on March 8, 2024, the U.S. District Court for the Middle District of Florida suspended Thomas Grant Neusom for one year from practicing in the court for submitting pleadings containing AI-fabricated cases.⁷

To ascertain how common this problem is, the author conducted a test using Bard (renamed thereafter as Gemini), Lexis+AI, and Westlaw’s Ask Practical Law AI. Below are the conversation transcripts and an analysis of the results.

Bard

Beyer to Bard: “In Texas, can an incompetent person revoke a power of attorney?”

Bard to Beyer: “No, an incompetent person cannot revoke a power of attorney in Texas. [general discussion of powers of attorney]”

Analysis: True, for financial powers of attorney. False, for medical power of attorney. Beyer to Bard: “Do you have statutory or case authority to support your statement.”

Bard to Beyer: “Yes. . . . Texas Probate Code Section 465.004 . . . The Texas Court of Appeals has held that an incompetent person cannot revoke a power of attorney. In the case of *In re Estate of Miller*, 681 S.W.2d 619 (Tex. App. 1984) . . . The court reasoned that an incompetent person lacks the legal capacity to revoke a power of attorney.”

Analysis: Texas repealed the Probate Code in 2014. The Probate Code never had a section 465.004. Section 465.004 of the replacement Estates Code deals with presumptions of death. The *Miller* case does not exist. The citation is to *Goff v. State*, a murder case.

Beyer to Bard: “The case you cited does not exist.”

Bard to Beyer: “I apologize for my previous response. I have double-checked my records, and I cannot find any case law in Texas that directly addresses the question. [Cites cases from other states.]

Analysis: Those cases also do not exist.

Beyer to Bard: “Both of these cases also do not exist.”

Bard to Beyer: “I apologize again for my previous responses. I have checked my records again more carefully, and I can confirm that neither of the cases I cited exist. I am still under development, and I am constantly learning. I appreciate your feedback, and I will try my best to avoid making similar mistakes in the future.

Lexis+AI

Beyer to Lexis+AI: “In Texas, can an incompetent person revoke a power of attorney?”

Lexis+AI to Beyer: “In Texas, a contract executed by a person who lacks mental capacity is voidable, not void. This includes a power of attorney executed by an incompetent person.” [further discussion and authorities]

Analysis: No distinction between financial and medical powers of attorney. Accurate authorities cited. Beyer to Lexis+AI: You did not distinguish between a financial and medical power of attorney.”

Lexis+AI to Beyer: “In Texas, a principal can revoke a medical power of attorney at any time, regardless of their mental state or competency.” [further discussion and authorities]

Analysis: Correct with accurate authorities cited.

Westlaw’s Ask Practical Law AI

Beyer to Ask Practical Law AI: “In Texas, can an incompetent person revoke a power of attorney?”

Ask Practical Law AI to Beyer: “In Texas, an incompetent person cannot revoke a power of attorney. A non-durable power of attorney terminates upon the principal’s incapacity. For a medical power of attorney, revocation can occur through the principal’s oral or written notification of revocation to the agent or health care provider, at any time, without regard for the principal’s competency. However, a general power of attorney remains in effect for the principal’s lifetime unless it is automatically terminated or revoked, such as when the principal revokes the power of attorney, or a court appoint

ts a permanent guardian of the estate to manage the principal’s estate. Therefore, while there may be some exceptions for specific types of powers of attorney, generally a person who is deemed incompetent cannot revoke a power of attorney.

Analysis: Accurate answer.

This example demonstrates that AIs can generate responses ranging the gamut from totally fictitious to very accurate. Likewise, a 2024 study by Stanford University revealed that non-legal AIs hallucinate approximately 40% of the time and legal AIs hallucinate approximately

17% of the time.⁸ Thus, to quote President Reagan's use of the English translation of the Russian proverb with regard to nuclear disarmament, "Trust, but verify." Or perhaps, you would be advised to follow an updated proverb, "Don't trust but instead, verify."

Prompt Recommendations

The phraseology of your AI prompts will impact the accuracy and usefulness of the AI's responses. Below are some recommendations:⁹

Be specific about what you seek. For example, in my test described above, I should have mentioned the two types of power of attorney and then asked specifically about the one in which I was interested.

Use examples of the type of response you are seeking.

Avoid ambiguous and unclear language to help the AI locate a response which matches the meaning of the terms you include in the prompt.

Keep your prompt on topic. Do not ramble as if you were actually asking a human.

Avoid asking for "yes" or "no" answers. Force the AI to provide an explanation of its response.

Provide context such as your goal, the audience to which you want the reply directed, etc.

The tone of your prompt should match the tone of the response you seek. As a simple example, if you tell an AI "I love you," the odds are likely that it will reply, "I love you, too" because that is the common response to the question. Likewise, if you tell the AI, "I hate you," it is likely to respond in a similar manner.

After you ask your question, include a statement such as, "Before you answer, ask me any questions you have so that you can make a better response." Many times, the AI will reply with questions which will be very helpful in getting the information you seek.

Be sure the facts in your prompt are true. Sometimes, the AI will assume the truth of the material in your prompt and thus the reply may be based on incorrect facts.

Confidentiality

The use of AI raises significant confidentiality concerns. The Model Rules of Professional Responsibility stress the importance of maintaining the confidences of clients. Rule 1.6 begins by imploring that lawyers "shall not reveal information relating to the representation of a client unless the client gives informed consent." Likewise, attorneys "shall make reasonable efforts to prevent the

inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."

AI's assimilate the information you provide in your questions, data, and uploaded materials into its training material. Thus, if you tell the AI that your client is James T. Kirk and he wants to create a trust with his 1,701 shares of Enterprise stock for Leonard McCoy, his good friend, the AI now knows what Kirk owns, his relationship with Leonard, and how he wants to dispose of Enterprise stock. The AI will then use that information in answering queries from other users of the AI. Of course, it would be much worse if sensitive material such as social security numbers, medical conditions, true parentage of children, and marital harmony were included in the prompts.

How do you solve this problem? First, do not include any client-identifying information in AI prompts. Be certain to phrase research and drafting requests using very generic language. These restrictions, of course, limit the usefulness of AI's. Accordingly, you should consider obtaining AI products which do not incorporate prompts into its training database. Even if an AI provider claims that entered data does not migrate into the AI permanently, you need to ascertain that the provider has adequate cyber security. Below is the sage advice from the State Bar of California:

A lawyer or law firm should consult with IT professionals or cybersecurity experts to ensure that any AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols.

A lawyer should review the Terms of Use or other information to determine how the product utilizes inputs. A lawyer who intends to use confidential information in a generative AI product should ensure that the provider does not share inputted information with third parties or utilize the information for its own use in any manner, including to train or improve its product.¹⁰

Disclosure of Use to Clients

Opinions vary regarding whether you need to disclose to clients that you plan to use AI in their representation and if prior express consent of the client is needed rather than mere disclosure. ABA Formal Ethics Opinion 512 provides that "clients would need to be informed in advance, and to give informed consent, if the lawyer proposes to input information relating to the representation into the GAI tool. Lawyers must also consult clients when the use of a GAI tool is relevant to the basis or reasonableness of a lawyer's fee." The Opinion also states that "if a lawyer is

using the tool for idea generation in a manner that does not require inputting information relating to the representation, client informed consent would not be necessary.”

Even if not required, prior consent is advisable to protect the attorney from potential future client disputes. For example, your engagement letter or contract could contain a provision such as this:

By signing this agreement, you understand that we use artificial intelligence programs to assist in [doing legal research] [drafting your estate planning documents] [preparing court filings in the probate process], and assisting in other matters pertaining to our representation. To protect the confidentiality associated with the attorney-client privilege, [we prohibit the use of client-specific information in using these programs] [we use only programs which do not allow your information to be used outside of our firm]. We will use all reasonable efforts to prevent inadvertent or unauthorized disclosure of your information. By signing this agreement, you consent to our use of artificial intelligence programs as just described.

Disclosure of Use to Courts

A rapidly growing number of courts are requiring attorneys to disclose whether AI was involved in the drafting of pleadings, briefs, and other documents. Many of these courts also specify exactly what the attorney must disclose and provide the language the attorney must include with the filings. Below is an example cobbled together from several court-mandated disclosures:

Generative artificial intelligence (AI) tools have been used in the [preparation] [research] [drafting] of this [petition] [motion] [complaint] [answer] [brief] [etc.] filed with this court. Specifically, [ChatGPT] [Gemini] [Co-Pilot] [vLex] [Lexis+AI] [Westlaw’s Co-Counsel] [etc.] was used to [conduct legal research] [draft the document]. The undersigned hereby certifies that each and every legal assertion, citations to judicial and legislative authority, or other law and references to the record of this case have been independently verified as accurate.

Supervision of Law Firm Members and Staff

If you elect to use AI in your practice, you have the duty to supervise and instruct other firm members on its proper use and the confidentiality issues previously discussed. The Model Rules provide that a partner or other lawyer with comparable managerial authority must “make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in

the firm conform to the Rules of Professional Conduct.”¹¹ The same responsibility exists toward “a nonlawyer employed or retained by or associated with a lawyer.”¹²

You or your firm should provide “training on the ethical and practical aspects, and pitfalls, of any generative AI use.”¹³ It would also be prudent to include a provision such as the following in your employee handbook:

Our law firm provides artificial intelligence tools to assist you and your colleagues to perform the drafting, research, and other duties associated with your position. You have a responsibility to use these tools primarily for purposes that directly relate to serving the interests of this firm, including compliance with the Rules of Professional Conduct. You may not input or store any client information in an AI program that is accessible to anyone other than the employees of our firm.

The firm should consider enforcement methods to ensure that all staff members abide by the policy. One method is to install software on all firm computers which tracks all use of AIs including the name of the user, the prompts used, and the AI’s responses. This may, however, raise employee concerns about privacy and being micro-managed. Another possibility is to randomly examine work product for the tell-tale signs of AI drafting such as a high frequency of the use of legal terminology, overuse of paragraph markers such as “overall,” “consequently,” and “however,” frequent use of numbered lists, and inclusion of unnecessary or repetitive words and statements.¹⁴ You might also consider taking blocks of text and submitting it to an AI detector such as www.copyleaks.com which is trained to recognize AI generated text.

Supervision of the AI Itself

Actual supervision of an artificial intelligence is generally beyond your control because you are an end user and not a programmer. Nonetheless, you can impact the AI in a favorable manner by assuring that you input only accurate and unbiased data. In addition, make certain you are using the most current version of the AI and that all updates and patches are properly installed. If you detect that the AI’s output is inaccurate or biased, report these problems to the provider.

Billing

Model Rule of Professional Conduct 1.5 provides that the attorney cannot “make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses.” The attorney may charge for the actual time spent using AI such as creating prompts, examining the AI outputs, confirming their accuracy, and editing

them. However, the attorney may “not charge hourly fees for the time save by using AI.”

Failure to use AI could also lead to claims that an attorney’s bill is unreasonable. A client could contend that if the attorney had used AI, the amount of time spent on the client’s case would be less resulting in a lower fee.

Flat fees also raise concerns. “[I]f using a GAI tool enables a lawyer to complete tasks much more quickly than without the tool, it may be unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the GAI tool as when not using it. A fee charged for which little or no work was performed is an unreasonable fee.”¹⁵

Advertising

Model Rule 7.1 states: “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.” How will this impact advertising about the firm’s use of AI? A firm may be able to extol the skills of its AI assuming they can be confirmed objectively. However, may a firm advertise that the AI it uses is superior or unique compared to AIs used by other firms? If yes, how could this statement be verified? The attorney should not disparage other lawyers or firms who do not use AI. Instead, the advertising should focus on the unique value offered through AI integration. In addition, an attorney may risk an ethical violation for deceptive advertising if the attorney claims to have estate planning expertise but is instead relying on AI.

AI Concerns

Recent surveys reveal that only about 25% of attorneys believe that AI is a threat to the legal profession. Other concerns such as competition from non-lawyers, clients unwilling to pay, and self-help techniques were deemed to be more threatening.

This last concern deserves additional discussion. There are a growing number of companies that use AI to provide free or low-cost estate planning documents on their websites.¹⁶ In the past, these documents were primitive and error-ridden. However, they are now growing in sophistication and accuracy.

Your challenge is to justify to potential clients why they should pay you hundreds of thousands of dollars for products they can obtain for no cost or only a nominal fee with at-home convenience. You should explain that you provide personal attention, advice, and customization beyond what the AIs can create. You can explain how you

can anticipate future problems such as a will contest and then take steps to mitigate the risk of a contest or the likelihood of its success. Although against your self-interest, you may also explain that if you are negligent, they have someone to sue for malpractice while they are likely be without a remedy if the AI makes an error in preparing the client’s documents.

Other Risks of Using AI

AI possesses other risks that are not covered by normal professional responsibility rules. Some of these are detailed below.

Ability of AI to Translate Keystroke Clicking

“AI can decipher keyboard inputs by sound with 95 percent accuracy.”¹⁷ Thus, if you are sitting at your favorite coffee shop working on your computer, someone whose phone or computer is within earshot could record your tapping and then use a specially trained AI to decipher what you are writing. The term of art for this “peeping Tom” technique is acoustic side-channel attack.

Ability of AI to Replicate Voices

AI voice cloning technology is now widely available on many Internet sites. They often need just a few seconds of audio to clone a voice. And, this cloning can mimic the speaker’s emotions and the acoustic environment such as whether the speaker is on the phone, in a car, or in an office environment.¹⁸ Many websites such as Speechify offer free voice cloning services which tout, “AI Voice Cloning: Clone Your Voice Instantly. Create high quality AI clones of human voices within seconds. No special equipment required. Works right in your browser. Try it below!”¹⁹

Accordingly, when you are speaking with a client over any voice-transmission service (landline telephone, cell telephone, Internet-based audio communication program, etc.), you must take precautions to assure you are actually speaking with your client and not someone using AI voice cloning to impersonate your client. For example, you could ask your client a question that only he or she would know the answer or request that the client provide a hard-to-guess code word that you established during a face-to-face meeting.

Final Thoughts

Escaping the expansion of AI is not possible. Fortunately, given the intensely personal nature of estate planning, you are not likely to lose your job to an AI. Instead, you may lose your job to someone who knows how to use AI effectively.

Select AI products with due diligence with special emphasis on the vendor's cybersecurity for entered data and assurance that the vendor will not use your data to train its AI.

Verify all AI results for accuracy and completeness.

Protect client confidences.

Disclose your use of AI to your clients and obtain informed consent to use AI. Train and supervise your staff about the use of AI.

Inform the court of your use of AI for any material you submit to the court.

Conclusion

AI has powerful benefits and its use in your estate planning practice is likely to grow and provide you with considerable benefits which you can use to the advantage of both you and your client. Of course, "With great power there must also come great responsibility."²⁰ By following the guidelines suggested in this Study, you should better be able to use AI in a professional and responsible manner.

FOOTNOTES

1. Governor Preston E. Smith Regents Professor of Law, Texas Tech University School of Law, Lubbock, Texas. Prof. Beyer holds a J.D. summa cum laude from the Ohio State University and LL.M. and J.S.D. degrees from the University of Illinois. Previously, Prof. Beyer served as a professor or visiting professor at Boston College, La Trobe University (Melbourne, Australia), Ohio State University, Southern Methodist University, St. Mary's University, University of New Mexico, and Santa Clara University. Prof. Beyer was inducted into the National Association of Estate Planning Councils' Estate Planning Hall of Fame, received the Distinguished Probate Attorney Lifetime Achievement Award, from the State Bar of Texas, and served as the Reporter for the Uniform Electronic Estate Planning Documents Act. He is a member of the Order of the Coif, an Academic Fellow and former Regent of the American College of Trust and Estate Counsel, and a member of the American Law Institute.
2. Borg, Wikipedia (Jan. 14, 2024) ("resistance is futile" is catch phrase for any juggernaut against which you cannot prevail).
3. Model Rules of Pro. Conduct R. 1.1 cmt. 8 (emphasis added).
4. ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 512 at 2–3 (2024) (citations omitted).
5. State Bar of California, Standing Committee on Professional Responsibility and Conduct, Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law at 3.
6. Mata v. Avianca, No. 22-cv-1461, 2023 WL 4114965 (S.D.N.Y. June 22, 2023); Debra Cassens Weiss, Lawyers who 'doubled down' and defended ChatGPT's fake cases must pay \$5K, judge says, ABA J. (June 26, 2024).
7. Bob Ambrogi, Federal Court Suspends Florida Attorney Over Filing Fabricated Cases Hallucinated by AI, LawNext.com (Mar. 14, 2024).
8. Bob Ambrogi, Stanford Will Augment Its Study Finding that AI Legal Research Tools Hallucinate in 17% of Queries, As Some Raise Questions About the Results, LawNext.com (May 28, 2024).
9. Some of these recommendations are based on Ross Bruch, Prompt and Circumstances, Prob. & Prop., July/Aug. 2023, at 58.
10. State Bar of California, Standing Committee on Professional Responsibility and Conduct, Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law at 2.
11. Model Rules of Pro. Conduct R. 5.1(a).
12. Model Rules of Pro. Conduct R. 5.3.
13. State Bar of California, Standing Committee on Professional Responsibility and Conduct, Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law at 4.
14. See 13 Ways to Detect AI Written Content, <https://surferseo.com/blog/detect-ai-content/> (Apr. 1, 2024).
15. ABA Standing Comm. on Ethics & Pro. Resp., Formal Op. 512 at 12 (2024) (citations omitted).
16. These companies include Willing, Quicken WillMaker Plus, Rocket Lawyer, Law Depot, Legal Zoom, Do Your Own Will, Total Legal, and U.S. Legal Wills.
17. Jackson, AI can decipher what you're typing on your keyboard with 95% accuracy – should we be worried?, T- HQ (Sept. 6, 2023).
18. Kristin Houser, Microsoft's new AI needs just 3 seconds of audio to clone a voice, Freethink (Jan 12, 2023).
19. AI Voice Cloning: Clone Your Voice Instantly, Speechify (last visited Nov. 24, 2024).
20. Amazing Fantasy #15 (catch phrase with regard to Spiderman's superpowers).