

SPRING 2024: UNENDING CONVERSATION

**STETSON LAW REVIEW FORUM**Conversation Starter**A NEW PARLOR IS OPEN: LEGAL WRITING FACULTY MUST DEVELOP SCHOLARSHIP ON GENERATIVE AI AND LEGAL WRITING<sup>1</sup>***Kirsten K. Davis\***I. INTRODUCTION*

Generative artificial intelligence, in the form of large language models that can generate comprehensible human-sounding communication from scratch,<sup>2</sup> represents

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\* © 2024, All Rights Reserved. Kirsten K. Davis, J.D., Ph.D., Professor of Law, Provost's Faculty Fellow for Generative Artificial Intelligence and Higher Education, Faculty Director of Online Legal Education Strategies, Stetson University College of Law, St. Petersburg, Florida. My thanks to Chris Reich, Casey Reich, Sylvia Smith, Marisa Infante, and the many members of the Legal Writing and Generative AI Convo Group.

<sup>1</sup> This essay was informed and inspired by a panel presentation given by the author with her friend and colleague Carolyn A. Williams, "A Conversation about GenAI's Impact on Legal Communication Scholars and Scholarship," at a session of the 2024 Association of American Law Schools sponsored by the Section on Legal Writing, Reasoning, and Research entitled *The AI Era: Leveraging Large Language Models to Improve the Lawyer's Craft*. See Carolyn A. Williams & Kirsten K. Davis, Panel Presentation: A Conversation about GenAI's Impact on Legal Communication Scholars and Scholarship at Association of American Law Schools (2024), <https://am.aals.org/past/am24/> (providing video accessible for AALS members). The author thanks Professor Williams for her partnership in the joint presentation and for her blessing for the author to write this essay based on that presentation. Artificial intelligence in the form of ChatGPT4, Grammarly, and Word Editor was used in writing this essay. ChatGPT4 assisted with generating ideas, inspiring content, and conversing with the author on various topics. Grammarly and Word Editor helped with revision and proofing, which included making suggestions to improve correctness, clarity, engagement, and delivery.

<sup>2</sup> Several sources do a good job of introducing the basic structure and function of Generative AI for those who are not AI scientists. See, e.g., Timothy B. Lee and Sean Trott, *A Jargon-Free Explanation of How AI Large Language Models Work*, ARS TECHNICA (July 31, 2023, 7:00 AM) <https://arstechnica.com/science/2023/07/a-jargon-free-explanation-of-how-ai-large-language-models-work/>; Kevin Roose & Cade Metz, *How to Become an Expert on AI*, N.Y. TIMES (Apr. 4, 2023); <https://www.nytimes.com/article/ai-artificial-intelligence-chatbot.html>; Kevin Roose, *How Does ChatGPT Really Work?*, N.Y. TIMES (Mar. 28, 2023) <https://www.nytimes.com/2023/03/28/technology/ai-chatbots-chatgpt-bing-bard-llm.html>; *Introduction to Generative AI*, COURSERA, <https://www.coursera.org/learn/introduction-to-generative-ai> (last visited Apr. 4, 2024).

a likely paradigm shift in legal communication teaching, learning, and practice.<sup>3</sup> What we know (so far) about generative AI suggests that law school legal writing courses will need to teach generative AI skills as part of a hybrid human-generative AI legal writing process. This means that legal writing faculty will need to understand how generative AI works, its implication for legal writing practices, and how to teach legal writers the needed knowledge and skills to ethically and effectively use generative AI in their work.

As of this writing, not much has been written by legal writing scholars to identify or explore what we might call the “big issues” that generative AI poses for legal writing. There is also minimal legal writing-specific scholarship—theoretical, philosophical, rhetorical, pedagogical, empirical, or otherwise—examining the impact of generative AI on legal writing education, ethics, or practices.<sup>4</sup> But generative AI is not going away, and it will likely impact how today’s law students complete the fundamental tasks of lawyering in their future practices. As such, as a community of scholars, legal writing faculty must get busy and commit to leading the inquiry into the connections between generative AI and legal writing products, processes, and practices. This is an exciting time to be a legal writing scholar and teacher because there are so many unanswered questions to explore about the relationships between human writers and (nearly) autonomous machine writers.

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<sup>3</sup> Perhaps the professional paradigm for legal practice has been shifting for a while. Richard Susskind has been writing about this shift since before the turn of the century. He continued to develop his theories and observations on the intersection of law, technology, and the future of legal practice through several works. *See, e.g.*, RICHARD SUSSKIND, *THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY* (1998); RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (Rev. Ed. 2010); RICHARD SUSSKIND, *TOMORROW’S LAWYERS: AN INTRODUCTION TO YOUR FUTURE* (3d Ed. 2023); RICHARD SUSSKIND & DANIEL SUSSKIND, *THE FUTURE OF THE PROFESSIONS: HOW TECHNOLOGY WILL TRANSFORM THE WORK OF HUMAN EXPERTS* (Updated Ed. 2022). For legal writing faculty, however, the shift to the wide availability of generative AI has made the shift more acute. That is, until the end of 2022, when Open AI released ChatGPT, there was no artificial intelligence widely available to end users that could statistically compute the relationships between bits of language and generate entirely new conversational texts from scratch. *See* Sofia Bliss-Carrascosa & Jeff Cercone, *What is Generative AI and Why Is It Suddenly Everywhere? Here’s How Tools Like ChatGPT and Dall-E Work*, POYNTER (June 22, 2023), <https://www.poynter.org/fact-checking/2023/what-is-generative-ai-and-why-is-it-suddenly-everywhere-heres-how-tools-like-chatgpt-and-dall-e-work/>.

<sup>4</sup> This is not to say that there is no growing body of scholarship. *See, e.g.*, Carolyn Williams, *Bracing for Impact: Revising Legal Writing Assessments Ahead of the Collision of Generative AI and the NextGen*, 28 *LEGAL WRITING* 1 (2024); John Bliss, *Teaching Law in the Age of Generative AI*, *JURIMETRICS* (Forthcoming 2024); Michael L. Smith, *Language Models, Plagiarism, and Legal Writing*, 22 *N. H. L. REV.* (Forthcoming 2024); Joseph Regalia, *From Briefs to Bytes: How Generative AI is Transforming Legal Writing and Practice*, *TULSA L. REV.* (Forthcoming 2024); Hadar Yoana Jabotinsky & Roe Sarel, *Co-authoring with an AI? Ethical Dilemmas and Artificial Intelligence*, *ARIZ. STATE L. J.* (Forthcoming 2024); Richard M. Re, *Artificial Intelligence and Judicial Opinions*, *GEO. WASH. L. REV.* (Forthcoming 2024).

Unlike other essays in the Unending Conversation collection, this essay does not enter a conversation with another article or essay already appearing in the legal writing literature. Instead, this essay is a conversation starter; it is meant to “open the parlor door,” so to speak,<sup>5</sup> and encourage legal writing faculty to join the scholarly conversation at the intersection of generative AI and legal writing. As legal communication experts, legal writing faculty are well-situated to be frequent and assertive speakers in this conversation and to author scholarship that will substantially alter and define the discipline of legal writing for many years to come.

I believe that knowledge is largely constructed through discourse within communities.<sup>6</sup> As such, my goal in inviting legal writing scholars to develop the conversation about the impact of generative AI on legal writing is to establish a discursive space where scholars can explore the issues that are ripe and relevant for exploration. In conversation with each other, legal writing scholars can produce knowledge about generative AI and legal writing through a body of engaged scholarship about the important and urgent questions that face us as experts and teachers in the field.<sup>7</sup> This essay explains why legal writing faculty should be front and center in the scholarship of generative AI, explains why generative AI represents the start of a paradigm shift in legal writing that requires scholarly investigation, and presents some ideas for the “big issues” that will need research.

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<sup>5</sup> “Imagine that you enter a parlor,” Kenneth Burke says, in his imagining of the “unending conversation.” KENNETH BURKE, *THE PHILOSOPHY OF LITERARY FORM: STUDIES IN SYMBOLIC ACTION* 110–11 (2d ed. 1967). In his description, the parlor had been occupied by people conversing throughout history, talking about the important issues of the day. *See id.* But how did that parlor come to be? I imagine that the parlor started when one friend opened her door to the furrowed brow of another and said, “Come in, let’s talk.” It was a warm day, so the door remained open. Others heard the conversation and wandered in. The conversation was so fascinating, the parlor so cozy, and the pastries so delicious that the conversation never ended.

<sup>6</sup> *See, e.g.*, KENNETH BURKE, *LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, & METHOD* 45 (1966) (“[A]ny given terminology is a *reflection* of reality, [and] by its very nature [also] a *selection* of reality; and to this extent it must function also as a *deflection* of reality.”); *see also* James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 691 (1985) (describing law as a rhetoric where the law is created through a culture of argument within a community of lawyers); Sonja K. Foss & Cindy L. Griffin, *Beyond Persuasion: A Proposal for Invitational Rhetoric* 62 COMM. MONOGRAPHS 1, 16 (1995) (describing the “heuristic, inventive” function that rhetoric can create when positioning it as “invitational” and thus allowing for “development of interpretations, perspectives, courses of action, and solutions to problems”).

<sup>7</sup> There is an irony, perhaps, in generative AI’s extraordinary capacity to have dynamic conversations with its users and the assertion that scholarly conversations are locations where knowledge is created. Plato’s dialectics were meant to generate knowledge through interactions between interlocutors. Could dialectics with a large language model do more than reflect what is already present in the corpus? Could those conversations create knowledge?

## II. LEGAL WRITING SCHOLARS SHOULD BE FRONT AND CENTER IN THIS CONVERSATION

I have said in the past—and I’m sticking with that definition—that legal writing scholarship is “communication-centered and law-focused.”<sup>8</sup> As such, legal writing scholarship would easily encompass explorations into how generative AI, a communication technology,<sup>9</sup> intersects with legal writing. As I explore further below, I am challenged to think of a scholarly question about legal writing that could not be reimagined, revised, or extended as a question that involves the impact of generative AI on legal writing. In addition, I think several novel issues for exploration arise from the intersection of generative AI and legal writing. This is why legal writing faculty should do this scholarly work.

The training and interests of legal writing faculty are well-suited for this research. Many, if not most, faculty who teach legal writing have spent countless hours exploring the rhetorical, composition, theoretical, ethical, and legal forces that impact the ways lawyers write and that can help interpret the written products.<sup>10</sup> Importantly, scholars have explored how technological advances impact writing.<sup>11</sup> For example, scholars have asked questions about legal writing and reading “on the screen,”<sup>12</sup> identified the genre of legal writing known as the “email memo,”<sup>13</sup> explored questions of citation “stickiness” in a digital world,<sup>14</sup> described the features of legal blogging in digital media,<sup>15</sup> and explored visual rhetoric as a facet of legal persuasion,<sup>16</sup> to name a few. This well-developed literature puts those who already

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<sup>8</sup> Kirsten K. Davis, *A Provisional Definition of “Legal Writing Scholarship,”* 2 UNIV. OR. PROC.: ONLINE J. LEGAL WRITING CONF. PRESENTATIONS 7, 10 (Fall 2021).

<sup>9</sup> It is true that generative AI can be thought of in other ways as well: as a technology, an artificial intelligence, or a statistical tool. But it is most definitely a tool for communicating information in writing (and in some cases, through voice-to-text technology, by speech).

<sup>10</sup> See generally the works contained in *Legal Writing*, J. LEGAL WRITING INST., <https://www.legalwritingjournal.org/> (last visited Apr. 5, 2024); LEGAL COMM’N & RHETORIC: JALWD <https://www.alwd.org/aboutlcr> (last visited Apr. 5, 2024); and *Monograph Series*, LEGAL WRITING INST., <https://www.lwionline.org/publications/monograph-series> (last visited Apr. 5, 2024) for countless representations of this work.

<sup>11</sup> See, for example, *Volume 8: Legal Communication and Technology*, LEGAL WRITING INST. (May 7, 2020), <https://www.lwionline.org/publications/monograph-series>, which contains a variety of articles that address the connection between legal writing and technology.

<sup>12</sup> See, e.g., Kirsten K. Davis, “*The Reports of My Death Are Greatly Exaggerated*”: Reading and Writing Objective Legal Memoranda in a Mobile Computing Age, 92 OR. L. REV. 471 (2014).

<sup>13</sup> See, e.g., Kristen Konrad Robbins-Tiscione, *From Snail Mail to Email: The Traditional Legal Memorandum in the Twenty-First Century*, 58 J. LEGAL EDUC. 32 (2008).

<sup>14</sup> See, e.g., Aaron S. Kirschenfeld & Alexa Z. Chew, *Citation Stickiness, Computer-Assisted Legal Research, and the Universe of Thinkable Thoughts*, 19 LEGAL COMM. & RHETORIC 1 (2022).

<sup>15</sup> See, e.g., Jennifer Murphy Romig, *Legal Blogging and the Rhetorical Genre of Public Legal Writing*, 12 LEGAL COMM. & RHETORIC 29 (2015).

<sup>16</sup> See, e.g., Michael D. Murphy, *Visual Rhetoric: Topics of Invention and Arrangement and Tropes of Style*, 21 LEGAL WRITING 185 (2016); Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systematizing the Decision to Use Visuals as Legal Reasoning*, 20 LEGAL WRITING 57 (2015).

study legal writing in a prime position to identify and research the critical issues of generative AI, where they intersect with domain-specific issues of legal writing. In doing this work, scholars can describe the processes involved in using generative AI for legal writing. They can apply critical theories to generative AI to evaluate its impact. They can also develop normative approaches to generative AI in legal communication contexts. In conditions like these, where the writing technology is so new and the potential transformations to unquestioned norms of legal writing so significant, robust conversation through scholarship that develops knowledge and understanding as well as raises more questions is critical.

Legal writing scholars can use the knowledge of rhetoric, composition, ethics, cognitive psychology, law, legal practice, and communication technology that exist within and outside of the field to guide lawyers and judges on what can and should be done with generative AI technology in practice.<sup>17</sup> Scholars can also theorize approaches to generative AI through research that guides legal educators in training future lawyers. The arrival of generative AI is arguably the most exciting thing to happen to legal communication in a generation, and it presents an opportunity for legal communication faculty to do groundbreaking work in this area.

### III. IS THIS A “PARADIGM SHIFT”?

Generative AI represents the kind of revolutionary innovation that marks the beginning of a paradigm shift because it is destined to change the thinking about (at least) some of the legal writing field’s fundamental concepts and practices.<sup>18</sup> The changes likely to happen to theorizing and conceptualizing legal writing caused by generative AI’s arrival can be compared to those resulting from new theories about

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<sup>17</sup> This is not to say that scholars in other disciplines will not do, and are not already doing, important work in this area. SSRN, for example, includes articles on generative AI from those working in the fields of education, composition and rhetoric, legal education, and others. My argument here is that generative AI in the context of legal writing and legal education presents both cross-disciplinary and domain-specific issues that legal writing scholars are in a unique position to address.

<sup>18</sup> See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 6 (3d ed. 1996) (noting that when anomalies arise that subvert an “existing” tradition, a shift in “professional commitments” that define a field’s understanding occur). I recognize the selection of “paradigm shift” to describe this moment is a bold move, particularly since Kuhn’s concept of a paradigm shift was meant for scientific fields, not social scientific ones. A Wikipedia entry, however, collects examples of the uses of “paradigm shift” to describe radical changes of thinking in other contexts. See *generally Paradigm Shift*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Paradigm\\_shift](https://en.wikipedia.org/wiki/Paradigm_shift) (last visited Apr. 5, 2024) (noting that “the term ‘paradigm shift’ has found uses in other contexts, representing the notion of a major change in a certain thought pattern—a radical change in personal beliefs, complex systems or organizations—replacing the former way of thinking or organizing with a radically different way of thinking or organizing”). But remember, the goal of this essay is to start a conversation and describe a new “parlor” for discussion. Perhaps a conversation will begin about whether this essay was right to characterize generative AI’s arrival as a paradigm shift. If so, the provocations in this essay will be successful. See *infra* text accompanying note 26 for an alternative way to think about this disruption.

and observations made via telescope in astronomy.<sup>19</sup> Astronomers saw phenomena in the solar system via telescope that could not be explained with the dominant paradigm.<sup>20</sup> These observations helped to cause a paradigm shift in theories about the solar system.<sup>21</sup> This shift changed the questions scientists could ask about the solar system and their fundamental assumptions about it.<sup>22</sup>

Generative AI presents legal writing scholars with the kind of crisis that Copernicus' theories and observations via telescope presented to astronomers<sup>23</sup>—there is a good argument that the arrival of generative AI reveals phenomena about legal writing that are not fully explainable with current theories and concepts. For example, a fundamental assumption that underlies common approaches to writing the arguments contained in a legal brief, for example, is the assumption that a human is not only responsible for the *ideas* contained in that legal argument but also is responsible for generating that text through the *act* of “writing”—handwriting, typing, or dictating<sup>24</sup>—which gets the words on the paper or the screen. It's not always the same human that does all of these things, but, nonetheless, it is a human who has generated that work. Accepting this core idea—that a human is (always?) the agent of writing—invokes additional unquestioned assumptions about authorship and the writing process. That is, humans are authors, and machines are not. Humans generate text; machines do not. Humans are writing *agents*; machines are writing *tools* to be used by humans.

But generative AI, through large language models, raises questions about these assumptions. Large language models designed to produce text from scratch demonstrate that humans need not *always* be the generators of legal ideas or the producers of legal texts. Generative AI raises the question of whether the legal writing process can be fundamentally different from what we have imagined. In other words, our original models and processes for writing placed humans at the center. Humans wrote legal texts using writing tools. But observing generative AI at work calls into question this assumption. Do large language models de-center humans as

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<sup>19</sup> See *id.* at 154 (discussing how observations through the telescope converted other astronomers to Copernicus' revolutionary theories about the solar system and the universe). Kuhn notes that an “anomaly will [sometimes] call into question explicit and fundamental generalizations of the paradigm.” *Id.* at 82. Perhaps we will observe anomalies in legal writing with generative AI that will call into question what we believe about the fundamental nature of legal writing.

<sup>20</sup> See KUHN, *supra* note 18, at 68–75 (discussing the development of Copernicus' theories and the inability of the “astronomical tradition” at the time to explain its observations and problems).

<sup>21</sup> See *id.* at 68–75, 154 (describing the theories and observations that revolutionized astronomy).

<sup>22</sup> See *id.* at 85 (noting that a new paradigm is “a reconstruction of the field from new fundamentals, a reconstruction that changes some of the field's most elementary theoretical generalizations as well as many of its paradigm methods and applications”).

<sup>23</sup> See *id.* at 67, 69 (noting that paradigm shifts happen from “crisis” and that the core of the Copernican “astronomical crisis” was a “technical breakdown”).

<sup>24</sup> New voice-to-text technology, which is different from traditional modes of dictation, raises its own questions about the nature of writing. Writing a document no longer necessarily requires *any* human (even a typist) to do more than *speak* into a machine. To *speak* and to *write* conflate in this new space; as such, this technology can cause us to question our assumptions about what it means “to write.”

writers? That is, at least in some cases, when humans interact with generative AI, are humans something other than “writers” in ways we have originally conceptualized? Could large language models be the *writers*, and humans are the *tools*? In the universe of legal writing, the arrival of generative AI makes us ask, “Is the human writer still (or always) the center?” And, if not, what next?

The question, “Who (or what) is at the ‘center’ of legal writing?” is just one of many new questions we can ask now that generative AI is widely available to legal writers. But the question demonstrates that legal writing scholars and teachers are at the beginning of a journey that will likely result in a revision of our worldview<sup>25</sup> about legal writing and legal writing education. New questions like these mark a paradigm shift, and paradigm shifts demand new perspectives on conventional legal writing wisdom.<sup>26</sup>

#### IV. THE BIG QUESTIONS AROUND WHICH LEGAL WRITING SCHOLARS CAN DEVELOP SCHOLARSHIP

Legal communication scholars can take up these big, paradigm-shifting questions. Such questions push the field to develop new theories, perspectives, interpretations, philosophies, and approaches that can explain what we observe when generative AI is part of the writing process and how lawyers and judges should (or should not) use generative AI. Below I explore four big questions around which legal writing scholars can begin organizing their thinking, conversations, and scholarship about the impact of generative AI on legal writing.

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<sup>25</sup> Kuhn notes that paradigm shifts result in a “shift of vision,” a change of worldview for a field so significant that “after a [paradigm shift brought on by a] revolution [, members of a field] are responding to a different world.” KUHN, *supra* note 18, at 111, 116.

<sup>26</sup> If paradigm shift is too strong a way to characterize changes in thinking about legal writing that we predict will follow the disruption caused by generative AI, another way of thinking about these changes is to think of them as a disciplinary “turn.” A “turn” in a discipline marks a change in the discipline’s perspectives, approaches, and methodologies. Turns happen by taking account of the field’s past in light of new information and ideas that have emerged. *See, e.g.*, Jo Guldi, *What is the Spatial Turn?*, SCHOLARS’ LAB, <https://spatial.scholarslab.org/spatial-turn/what-is-the-spatial-turn/> (last visited Apr. 5, 2024) (describing the spatial turn in the humanities); Philip Wander, *The Ideological Turn in Modern Criticism*, 34 CENT. STATES SPEECH J. 1, 18 (1983) (describing the ideological turn in rhetorical studies); Gabrielle M. Spiegel, *Presidential Address: The Task of the Historian*, 114 AM. HIST. REV. 1, 1 (2009) (describing the “linguistic turn” in historical research). A “turn” might be thought of as “paradigm shift-lite,” because while a turn marks a change in disciplinary perspectives, it does not represent as profound and broad a change to the field as a paradigm shift. An alternative way of thinking about the arrival of generative AI and its impacts on legal writing would be to think of it as the “generative AI turn” in legal writing, an awakening of sorts that marks the moment when the field’s concepts, theories, questions, and practices began to explicitly account for computationally generated texts.

A. What Does It Mean “To Write” as Legal Writers? Questions About the Writing Process

Legal writing scholars will need to interrogate what it means “to write” within and about the law with generative AI in the mix. Typically, as noted above, writing has been thought of as a human-centered process. A human prewrites, drafts, revises, edits, proofreads, and publishes; she completes the commonly accepted steps of what is deemed “writing.” Admittedly, that process has always been assisted by technology in some form—pens, typewriters, and computers are all technologies legal writers use to write. Most recently, legal writers have even more tech help in the form of tools like Word’s Editor, which more proactively assists the legal writer in the writing process by offering suggestions for corrections and improvements.

But generative AI arguably acts less like the proactive assistant found in Word’s Editor and more like the human writer herself. That is, legal writing scholars have to ask, what is different about the legal writing process when generative AI participates in it? Is the writing process necessarily a human-centered practice? Or does generative AI fundamentally change the nature of the process, making it technology-centered and human-assisted? Or, as a third option, is writing a dynamic process with the center shifting and changing as we write? For example, we might hypothesize that in the future, drafting a first draft of a legal document will be almost entirely technology-centered. But revising and editing a document might be a more human-centered stage. What will it mean for legal writers if that is true? What about other stages of the writing process? What will be the best practices at each of these stages in managing the relationship between human and machine?

To effectively teach lawyers to write legal documents competently and for legal writers to be competent writers, legal communication scholars will need to interrogate the steps in the legal writing process and ask whether new steps are required, some steps must be revised, and others are now obsolete. Scholars will need to consider whether we can describe a distinction between *human* writing and *technological* writing and, if not, what implications result for the writing process.

Scholars will need to question and perhaps reimagine the stages of legal writing and how generative AI fits into the workflow.<sup>27</sup> For example, because of their access to a vast corpus of human language, large language models arguably can do a better job in the prewriting stage of calling human writers’ attention to the commonplaces of legal argument.<sup>28</sup> In other words, scholars can ask if it is possible

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<sup>27</sup> We might call this a “Hybrid Human-AI” legal writing process. See, e.g., Sarah E. Eaton, *6 Tenets of Post Plagiarism: Writing in the Age of Artificial Intelligence*, MEDIUM (Apr. 4, 2023), <https://medium.com/@sarahelaineaton/six-tenets-of-postplagiarism-writing-in-the-age-of-artificial-intelligence-6340b809cba4>.

<sup>28</sup> “Commonplaces” in argument come from the classical rhetorical tradition and relate to the invention canon of rhetoric. Also known as “topoi,” commonplaces represent the shared understandings of the community and can be used to identify topics that will serve to ground persuasive arguments. *Topos*, OXFORD REFERENCE, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803104939>



that the inventive capacities of large language models can be more robust, at least in some instances, than humans. This question might yield research that predicts (or not) that competent legal analysis and argument development might someday ethically *require*, not just permit, the use of a large language model in the prewriting stage. And if this is the case, legal writers will need to have a solid understanding of how to use generative AI in this way at the prewriting stage (to work with or allow generative AI to work independently).

Another example is prompting or prompt engineering. Prompting, the process of giving a large language model natural language instructions on what text to produce,<sup>29</sup> is a potentially new genre of writing with a new audience and different rhetorical purposes. The audience for a prompt is a machine that doesn't just find information in the digital world; instead, it looks at vast amounts of language data and, based on that data, synthesizes information "from scratch."<sup>30</sup> The quality of that synthesis can turn on the prompt's quality. I think one way to characterize a prompt is as an effort to express in words the entirety of the rhetorical situation to which the machine, as a writer, must respond.<sup>31</sup> If that is the case, then rhetorical theory becomes relevant to the theory and skill of prompting and can provide the foundation for scholarly inquiry.

One might argue that prompting is really nothing new; it is simply another variation of the natural language searches legal writers have used to research the internet or legal databases. That assertion only adds to the reasons that prompting presents a critical question for legal writing scholars. What makes prompting different from other natural language searching, if at all? What skills does one need to prompt well? Is good prompting something more than good natural language searching? One might argue that effective prompting for legal writing, as opposed to legal research, requires a greater mastery of the vocabulary and meta-knowledge of legal writing. That is, perhaps an effective human legal writer in the not-too-distant future will need the vocabulary of a writing teacher; that is, the writer will need to teach the large language model how to be a legal writer. If that proves accurate, writing scholars will need to better understand what vocabulary is necessary to teach large language models to produce the documents legal writers want. The field will need empirical prompting studies that compare effective and ineffective methods. It will need theoretical scholarship that explains what it means to write documents

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261 (last visited Apr. 5, 2024); see PATRICIA BIZZELL & BRUCE HERZBERG, *THE RHETORICAL TRADITION: READINGS FROM CLASSICAL TIMES TO THE PRESENT* 4 (2d ed. 2001). The classical canons of rhetoric are steps that a rhetor uses to decide what they want to say or write. The canons include invention, arrangement, style, memory, and delivery. *Id.* at 3 ("This five-part composing process remains a cornerstone of the study of rhetoric.").

<sup>29</sup> THIMIRA AMARATUNGA, *UNDERSTANDING LARGE LANGUAGE MODELS* 109–10 (2023) (describing prompt engineering as an "art and science" and noting that the specific phrasing and structuring of prompts can "significantly influence the output").

<sup>30</sup> *Id.* at 34.

<sup>31</sup> *Id.* at 109–10.

*indirectly* through prompting. It will need new taxonomies of legal writing vocabulary that can be used to prompt.

A final example is to consider how we might rethink writing more broadly as a process of assembly<sup>32</sup> or, perhaps more precisely, “bricolage.” *Bricolage* is a French term that means using whatever is at hand to create something new. It has been used to describe “the intertextual authorial practice of adopting and adapting fragments from other texts.”<sup>33</sup> While using and adapting others’ texts in legal writing is not necessarily a new concept—legal writers build or “build around” the texts of legal authorities all the time and use forms and samples for their writing—the idea of assembling a document from existing fragments as a step in the legal writing process will need additional emphasis and development. Today, legal writers find themselves for the first time in a writing process where machine-generated text is (or will be) a widely available resource in assembly.

Because the ability to generate fragments of bespoke text—in large amounts—is new, the legal writing process could become even less about humans generating text from scratch and more about creating new wholes out of many parts, improvising and inventively reusing human and AI materials to create a new draft.<sup>34</sup> These are just a few of the questions generative AI raises for the writing process. More questions about the writing process will emerge in this conversation.

#### B. What Does It Mean to be an “Author”? Questions about the Ethos, Authenticity, and Citation of Legal Writers and Legal Texts

Generative AI’s possibilities for writing also arguably create a crisis of “authorship” in legal writing. This crisis arises because generative AI opens the door to ways of generating coherent, understandable texts that were previously thought impossible, and thus, who should “count” as an author—and how they (or it) should count—is in question. Questions of authorial intention, motivation, authenticity, and

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<sup>32</sup> “Document assembly” is not a brand-new concept. For example, software has been available in legal markets for automating the finding, production, and creation of legal forms and templates. *See, e.g., WestLaw’s Form Builder*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/products/form-builder> (last visited Apr. 5, 2024) (“Westlaw Form Builder is the convenient, easy-to-use, online legal document assembly tool that speeds up the form building process – so you can finish your legal forms faster and move on to other work.”). *See also* DYANE O’LEARY, LEGAL INNOVATION AND TECHNOLOGY: A PRACTICAL SKILLS GUIDE FOR THE MODERN LAWYER 94–100 (2023) (describing document builders). What this essay is suggesting is that more work can be done to theorize and explore “assembly” as a writing process and to consider how the arrival of generative AI will make that process more ubiquitous, more defined, and perhaps more creative.

<sup>33</sup> *Bricolage*, OXFORD REFERENCE, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803095526906> (last visited Apr. 5, 2024).

<sup>34</sup> Digital rhetoric theory could be one foundation for thinking about how to theorize the assembly of legal documents that include machine-generated bespoke text. *See* DOUGLAS EYMAN, DIGITAL RHETORIC: THEORY, METHOD, PRACTICE 44 (2015) (defining digital rhetoric as “the application of rhetorical theory . . . to digital texts and performances [including theorizing] the characteristics, affordances, and constraints of new media”).

responsibility are subject to revision in this new context. In other words, generative AI will likely require scholars to retheorize and reconceptualize what it means to be an “author” of a legal document.

For example, scholars will need to explore authorship and authenticity in legal writing; explorations of ghostwriting and plagiarism have raised these questions before, but generative AI adds new facets to those old questions. Scholars will need to consider what it means to author an argument or, in the case of judges and other lawmaking bodies, what it means to author “the law.”

The implications of this kind of exploration are significant. First, there are questions of citation. If generative AI is an “author,” do legal writers list it as a co-author? Is it possible to plagiarize or “ai-giarize” the texts produced by large language models? Should large language models “sign” legal pleadings? Could generative AI be subject to Federal Rule of Civil Procedure 11, for example? If generative AI is simply a tool, must legal writers disclose its use? And if so, when and in what circumstances?

For courts and legislatures, should generative AI be able to write the law? If so, what is the impact on the rule of law from machine-authored, binding legal texts? As faculty responsible for much of the communication instruction of tomorrow’s lawyers and judges, we must seriously research the impact of generative AI on the rule of law. What is gained and what is lost in generative AI’s presence? Consider Gerald Postema’s thoughts on the connection between the rule of law and artificial intelligence in his recent book, *Law’s Rule*:

Computers don’t “understand” the languages they translate, or even their own mathematical language for that matter. . . . [T]hey don’t understand the world. . . . And they don’t understand or appreciate the propositions, facts, norms, or arguments found in the legal texts fed to them. And, even more, they don’t understand the world in which these propositions, facts, and norms are embedded, from which they draw their meanings. Their predictions are not based on reasoning from existing rules and background norms, and the respective roles in the system of norms constituting legal order. . . . [A]lgorithms mimic meteorologists predicting the movement of a hurricane. Persuasion, registering the weight of an argument, and assessing reasons for understanding a rule in one way or another play no part in this process. An algorithm works from and analyzes the traces left (exhaust given off) by legal opinions, not from the rules, standards, arguments, and judgments of the opinions themselves.<sup>35</sup>

So what of this conclusion that artificial intelligence reasons differently? Does the text of that reasoning have no place in legal writing? Or does the availability of this predictively-generated text that *sounds like* legal argument have a legitimate, ethical role in writing the documents that rhetorically constitute legal argument and the law? And if it does, what role do humans have in ensuring that whatever mode of

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<sup>35</sup> GERALD POSTEMA, *LAW’S RULE: THE NATURE, VALUE, AND VIABILITY OF THE RULE OF LAW* 297 (2022).

reasoning it represents is used in a way consistent with the values in a system that upholds the rule of law? These are questions ripe for exploration.

Scholars could approach these authorship questions from various theoretical positions. Because of my rhetorical training, rhetorical theory comes to mind as a grounding for exploring these questions. Here's one example. Kenneth Burke, a mid-20<sup>th</sup>-century rhetorical theorist, offered the theory of "dramatism" as a way to explain human relations.<sup>36</sup> Burke suggested that dramatism could provide the most direct route to understanding "human relations and human motives" because dramatism involved analyzing language as a way to get at motivations.<sup>37</sup> As a "theory of terminology," Burke said dramatism was good for understanding the terms used to describe an act.<sup>38</sup>

Dramatism is one useful rhetorical method for parsing the ways we might think about—and thus describe—the possibilities for generative AI as an author.<sup>39</sup> Dramatism's categorical analysis method, the dramatist pentad, provides a structure for thinking about and a language for critiquing how and whether generative AI is an author or something else. The analysis of language via the dramatistic "pentad" makes observations in six (yes, six)<sup>40</sup> categories to shape how we might think about motivation in language:

- The "act," or what is being done;
- The "agent," or who is acting;
- The "scene," or where the act occurs;
- The "agency," or the means employed to complete the act;
- The "purpose," or why something is done; and
- The "attitude," or the agent's state of mind.<sup>41</sup>

Considering a rhetorical situation from these six perspectives can help scholars critically analyze any subject involving language production and reception. This is just the tip of the iceberg regarding Burke's theory of dramatism, but it might provide

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<sup>36</sup> Kenneth Burke, *Dramatism*, in 7 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 445, 445 (David L. Sills ed., 1968).

<sup>37</sup> *Id.* at 445.

<sup>38</sup> *Id.* at 448.

<sup>39</sup> Burke had his own generally negative ideas about the relationship between machines and humans. Burke said:

For whatever humanist critics might say about the 'dehumanizing' effects of the machine, it is a characteristically *human* invention, conceived by the perfecting of some human aptitudes and the elimination of others (this in effect being not inhuman, but man's powerful caricature of himself) a kind of mighty homunculus. . . . [P]ragmatist terminologies lay great stress upon 'agencies' (means) and . . . all machines have a kind of built-in purpose . . . .

*Id.* at 449. Thus, Burke says a pragmatist instrumentalism can give us a vocabulary for a "halfway" point between "teleology and sheer aimless motion." *Id.*

<sup>40</sup> DAVID BLAKESLEY, THE ELEMENTS OF DRAMATISM 32 (2001) (pointing out that the pentad has actually six, not five, parts).

<sup>41</sup> *Id.* at 32–33.

a starting point for exploring the nature of generative AI as an author (or not). The following paragraphs represent the conversation I am having with myself about how the dramatistic pentad could reveal the alternatives for conceptualizing generative AI as a producer of legal texts. The paragraphs below exemplify how legal writing scholars could organize a conversation about generative AI as an author, making what are, at the moment, only tentative, conflicting claims about the nature of generative AI.

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In Burke's dramatistic taxonomy, generative AI could be characterized as an *author* or *co-author*. Generative AI has agency; it engages in pure symbolic action. Although humans prompt it, humans do not control what it produces. The *scene* in which it acts overlaps with but also transcends the human scene. It "intends" to compute statistical relationships between bits of language and does so autonomously and independently of a human's involvement or intent. Its motivation is to produce texts that humans can understand. It is an author because it acts with the authority of one. It may not be "alive," but it is "lively," with rhetorical energy that matches, if not surpasses, human rhetorical energy.<sup>42</sup> Even if it does not exert the power of an individual author in all cases, it is at least a co-author, acting together with humans to contribute to and influence a written text's content, structure, style, and voice.

Alternatively, generative AI can be viewed as an *assistant*, a sort of *agent-agency* combined. Generative AI acts upon human instructions, whether those instructions are in computer code or conversational prompts. It *acts* with the *purpose* contained in human prompts and is confined to acting within the scope of action (i.e., the scene humans create for it). While it has some motivation to act, that motivation is vicarious—its motivation is human motivation, adopted. It is an agent that writes, true, but it writes only within the framework humans give it. In that regard, it acts most like a human writing assistant but not an author.

A third alternative would be to characterize generative AI as a means for writing, as an instrumentality of humans. It is an *agency*, a tool. As a tool, it has no motivation or purpose at all, thus distinguishing it from assistant or author. It acts within a *scene* of technology tools (i.e., pen, paper, keyboard, screen, GPU, extractive AI), which also have no independent *purpose* or motivation.

So, taking these competing characterizations, how might we further consider generative AI? In Burke's terms, one option might be to characterize

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<sup>42</sup> See MILES C. COLEMAN, INFLUENTIAL MACHINES: THE RHETORIC OF COMPUTATIONAL PERFORMANCE 1–23 (2023) (describing his theory of the "liveliness" of machines). See also George A. Kennedy, *A Hoot in the Dark: The Evolution of General Rhetoric*, 25 PHIL. & RHETORIC 1 (1992) (providing the foundation for Coleman's theory of liveliness).

the essence of generative AI as *agency*, as a tool used by a human author to write; it is not an author itself. Generative AI does not have its own ideas. It cannot create without human assistance. Humans train it; humans prompt it. Humans are responsible for evaluating its output because generative AI has no critical thinking abilities of its own to determine if what it wrote communicates what the human writer intended.<sup>43</sup> The implications of generative AI as a tool are thus:

- Generative AI cannot be plagiarized.
- Generative AI is not an authority.
- Generative AI should not be cited as an author, although the ideas it generates should be attributed to original authoritative sources when possible.
- Human authors can use, without attribution, the text that generative AI creates.
- Humans, as authors, are intellectually, legally, and ethically responsible for the generative AI content.

Compare the characterization above, that generative AI is a tool, to this characterization: generative AI is an *agent* performing the *act* of authorship; it is an author.

One might argue that generative AI cannot be an author, asserting that the meaning of a text resides only in the human author who wrote the text with a certain understanding, motivation, and intent. But is it an overstatement that meaning resides *only* in a human author? Could meaning and understanding exist elsewhere, in the interactions between, for example, the reader and the text?<sup>44</sup> And, if so, what implications does that have for generative AI as an author of legal texts?

Suppose the intentions of the original writer of a document no longer matter (or matter far less) to the meaning of a text. In that case, one might argue that authorship can be detached from humans without any significant consequences. In other words, a machine can author a legal text without

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<sup>43</sup> Copyright case law currently supports a view of generative AI—at least acting on its own—as non-author. For example, a recently decided case held that images autonomously produced by generative AI were not subject to copyright where there was no “traditional” human authorship. *See* Thaler v. Perlmutter, No. 22-1564, 2023 WL 5333236 (D.D.C. Aug. 18, 2023). There, the court noted that “the sine qua non [of] copyrightability [is] human creativity.” *Id.* At \*8. But the court goes on to say that “author” is not defined in the Copyright Act. *Id.* At \*9. However, the court concludes that the originator of a copyrightable work must be a human. *Id.* Note, however, that copyright questions, as they pertain to generative AI, are currently quite unsettled. An additional unsettled area concerns whether artificial intelligence can reason or “understand.” *See, e.g.*, Robert Wright, *Yes, AIs ‘Understand’ Things*, NONZERO NEWSLETTER (Feb. 23, 2024), <https://nonzero.substack.com/p/yes-ais-understand-things>.

<sup>44</sup> Postmodern language philosophers have long raised this question about where the meaning of text resides. *See, e.g.*, ROLAND BARTHES, *THE DEATH OF THE AUTHOR* (1968); MICHELE FOUCAULT, *WHAT IS AN AUTHOR?* (1969).

understanding it. Authorship can be based on the motivation to compute the relationships between words mathematically.

If one buys this argument, then perhaps limiting authorship to humans is too narrow a view of what legal writing can be. If meaning does not reside in an author but instead resides in the interaction between reader and text, then why do we care about how the author generated the text? If we do not, then generative AI could fit the definition of author and be treated like one. Some implications of that characterization might be:

- Generative AI can be plagiarized.
- Generative AI must be cited as an author, and original ideas must be attributed to it.
- Human authors must include generative AI as a co-author.
- Human authors, because they are co-authors with generative AI, must inform themselves sufficiently about their machine co-authors to rely on their content.

It might feel dangerous to separate authorship from author understanding. Being skeptical of a machine that can produce text by mimicking human language through mathematical computation but cannot understand its meaning, at least for now, is entirely reasonable.

This skepticism is, in part, what I think may be driving courts to regulate the use of generative AI. Without a human author, it becomes challenging to assess ethos, to “consider the source,” so to speak, of the text. Considering the author’s commitments, history, and reputation have been important to assessing the credibility of a legal document. Yet it “feels” as if the authenticity of the document is somehow compromised by the presence of a nonhuman text generator. As Coleman describes it, the presence of a machine who rhetorically performs like a human impacts our “mutual attribution of agency” that underlies human-to-human interaction.<sup>45</sup>

So, if we consider nonhumans as authors, where does this leave us regarding all of those judgments that legal readers have previously relied on to make decisions about the credibility, correctness, and authenticity of texts? We might be more comfortable characterizing generative AI as a tool and leaving authorship to humans. But maybe this view of authorship is too limited.

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This brief, exploratory analysis does not begin to exhaust all considerations of generative AI regarding authorship; it merely starts a conversation. More questions arise from this debate. For example, are the contexts for writing—academic, educational, legal, judicial—relevant to the authorship question? Should we reconsider the definitions of plagiarism now that generative AI has arrived? What happens to legal authorship if one takes a strong postmodern view? That is, even if

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<sup>45</sup> COLEMAN, *supra* note 42, at 9.

we think generative AI can meet the definition of author, does legal writing need authorship at all?<sup>46</sup>

In addition, as suggested above, questions of authorship raise issues of citation.<sup>47</sup> The citation question is a theoretical one and also a practical one: How should the *ALWD Citation Guide*, *Bluebook*, and other sources of legal citation rules address text created (in whole or in part) by generative AI? Legal citation has a rhetoric all of its own, and expert readers understand the explicit and implicit meanings in citation language. Arguably, however, the arrival of generative AI throws many of the assumptions underlying legal citation rules into question; it potentially disrupts our ability to confidently “read” citations and requires citation scholars to interrogate the rules in ways we’ve not imagined before.

According to the *ALWD Citation Guide*, citation serves the following purposes, which might be categorized as retrieval, credibility, and credit purposes:

- Give the nature and location of a source, which supports retrieval.
- Provide the weight and persuasiveness of a source.
- Indicate the type and degree of support a source provides.
- Show that positions are well-researched and supported.
- Give credit to others whose ideas are present in the document.<sup>48</sup>

Carolyn Williams, the author of the *ALWD Citation Guide*, also adds that citations are a source of legitimacy for authors, showing the reader that the author did thorough research by referencing the writers’ sources. In the law school setting, she notes that citations are a source of integrity; citations protect the author from plagiarizing or violating a school’s Honor Code.

Professor Williams, in a recent AALS Annual meeting talk, posited that perhaps none of the purposes of legal citation are met by citing generative AI.<sup>49</sup> Certainly, citations to generative AI could not be for retrieval; a reader cannot “retrieve” generative AI sources. In terms of credibility, she noted, citations to generative AI would not make the work more credible; in fact, citations to generative AI would make the writer, in many cases, less credible. And she offered that when

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<sup>46</sup> Interestingly, in litigation documents like motions and briefs filed with a court, one of the discourse conventions is to remove any first-person pronouns referring to the document’s author. That is, legal writing courses typically teach lawyers that their motions and briefs should not be written in the first person, using the pronouns I or me. (Lawyers, however, sign those court submissions, acknowledging they are responsible for the content even if they don’t write the documents in the first person.) This approach to writing gives it a formal tone, and it also makes the document seem as if it conveys not the arguments of a single advocate but a of universal “truth” of the law and its application to the facts. Perhaps we have always had questions of authorship expressed in litigation document conventions?

<sup>47</sup> Thank you to Carolyn Williams for her contributions to this paragraph and the next. She is a valued conversation partner on this topic!

<sup>48</sup> ALWD: GUIDE TO LEGAL CITATION, xlvii (Carolyn Williams & Ass’n of Legal Writing Dirs., 7th ed. 2021).

<sup>49</sup> Williams & Davis, *supra* note 1.



generative AI writes, perhaps there is no one to assign credit for the text, so the “giving credit” purpose is not met.<sup>50</sup>

On the other hand, one might argue that a writer using generative AI has reasons to cite it that are consistent with legal citation purposes. First, a citation to generative AI could demonstrate its weight as a source. In legal writing, as it stands now, generative AI does not have much, if any, weight as a legitimate source. As such, when a human writer does not check that text against verifiable sources, maybe the human writer should let the audience know, through citation, that specific text is attributable to generative AI exclusively. In addition, in the context of academic writing, where the purposes of legal writing and legal citation are somewhat different from that of legal practice, perhaps the integrity purpose of citing generative AI is relevant to understanding the author’s personal contributions to the text, and thus, citations are needed.<sup>51</sup>

The tensions in the exploration above demonstrate that the field will need more research on citation. Scholars will need to explore whether legal writers should be required to cite or be prohibited from citing generative AI-produced text. Scholars will need to form educated opinions on whether different citation rules are required for different kinds of legal writers. For example, should students, faculty, lawyers, and judges be treated differently regarding citing generative AI? In Burke’s dramatic terms, does the changing legal writing *scene* change the *act* of legal writing such that citation rules need to be different?

Scholars will need to make recommendations for the language of the citation rules. What should they say? Should generative AI be cited after every sentence? Be given an attribution as a co-author? Acknowledged in an introductory footnote? How much generative AI use merits co-authorship, acknowledgment, or citation?

### C. What Is Appropriate and Permitted When Writing with Generative AI?: Ethical and Legal Questions

In addition to the writing process and authorship questions, myriad ethical and legal questions are ripe for scholarly exploration. Inevitably, bar regulators will need to decide how generative AI, as a legal practice technology, fits into the existing ethical rules or requires new ones. For example, California has issued an ethics guidance document on generative AI, and the Florida Bar has issued an advisory

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<sup>50</sup> The ideas in this paragraph are derived largely from Professor Williams’ AALS Presentation (2024). *See id.*

<sup>51</sup> But will there be a distinction between human and machine contributions to writing in the future? *See Eaton, supra* note 27 (“Hybrid writing, co-created by human and artificial intelligence together is becoming prevalent. Soon it will be the norm. Trying to determine where the human ends and where the artificial intelligence begins is pointless and futile.”). For more useful work on rethinking plagiarism, see SARAH E. EATON, PLAGIARISM IN HIGHER EDUCATION: TACKLING TOUGH TOPICS IN ACADEMIC INTEGRITY 211–23 (2021), discussing the possibilities of the future of plagiarism and a possible post-plagiarism world.

ethics opinion.<sup>52</sup> The documents address ethics issues like competence with technology, confidentiality, informed consent, supervision of nonlegal assistants, marketing communication, and fees and costs.<sup>53</sup> For example, bar regulators are concerned about lawyers including client information in generative AI prompts and the relationship that this has to client confidentiality.<sup>54</sup> Regulators are already providing guidance on whether lawyers can charge fees for or expense the costs related to generative AI use.<sup>55</sup> It is likely that bar associations will form committees to investigate whether generative AI itself or its use amounts to the unauthorized practice of law. Legal writing scholars are in a prime position to generate research that can inform views on the ethics of hybrid human-generative AI legal writing.

Ethical questions also exist related to law school use, and they need investigation as well. What approaches should law schools take regarding academic integrity and generative AI?<sup>56</sup> How, if at all, should honor codes be changed? Should the use of generative AI on writing assignments always constitute unauthorized assistance or plagiarism? Does plagiarism itself need to be better defined or redefined?

Beyond the question of law school policies on the whole, faculty need to consider their syllabus policies and the ethics of generative AI use in their classes. What policies are appropriate? What messages about ethics are sent through these policies? In addition, should faculty use generative AI detection on student submissions?<sup>57</sup> What are the implications of that? Are there other or better ways to deter “cheating” with generative AI? For what reasons should we consider it cheating at all?

Beyond the ethics rules, the impact of generative AI on legal practice raises several legal issues that legal communication scholars might explore. Generative AI raises questions about when (and if) a lawyer violates attorney-client privilege by revealing client information in generative AI prompts.<sup>58</sup> Unresolved issues of copyright infringement affect a lawyer’s work with generative AI. Even constitutional

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<sup>52</sup> THE STATE BAR OF CALI, STANDING COMM. ON PROF. RESPONSIBILITY & CONDUCT, PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW (2023) <https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf> [hereinafter PRACTICAL GUIDANCE FOR GENERATIVE AI]; THE FLA. BAR, FLORIDA BAR ETHICS OPINION: OPINION 24-1 (Jan. 19, 2024), <https://www.floridabar.org/etopinions/opinion-24-1/> [hereinafter OPINION 24-1].

<sup>53</sup> See PRACTICAL GUIDANCE FOR GENERATIVE AI, *supra* note 52; OPINION 24-1, *supra* note 52.

<sup>54</sup> See, e.g., OPINION 24-1, *supra* note 52. (discussing confidentiality concerns).

<sup>55</sup> See, e.g., *id.* (discussing fees and costs).

<sup>56</sup> See Bliss, *supra* note 4 (discussing law school academic integrity questions).

<sup>57</sup> Shirin Ghaffary, *Universities Rethink Using AI Writing Detectors to Vet Students’ Work*, BLOOMBERG (Sept. 21, 2023, 4:00 PM), <https://www.bloomberg.com/news/newsletters/2023-09-21/universities-rethink-using-ai-writing-detectors-to-vet-students-work>.

<sup>58</sup> Foster J. Sayers, *ChatGPT and Ethics: Can Generative AI Break Privilege and Waive Confidentiality?*, ALM L. (Jan. 26, 2023, 9:01 AM), <https://www.law.com/legaltechnews/2023/01/26/chatgpt-and-ethics-can-generative-ai-break-privilege-and-waive-confidentiality/>.

questions are on the horizon: lawyers for criminal defendants must consider whether and in what contexts using generative AI might result in an ineffective assistance of counsel claim under the *Strickland* test.<sup>59</sup> In addition, courts (both domestic and foreign) are promulgating court rules that govern generative AI use.<sup>60</sup>

Every one of these legal and ethical questions sits at the intersection of legal communication and generative AI. Those in legal practice need legal writing scholars to explore these topics, gather data, and make clear and helpful recommendations on how to proceed. Critical and comparative analyses will also be helpful. For example, legal writing has recently been criticized for perpetuating Western norms to the exclusion of other ways of thinking, reasoning, and knowing.<sup>61</sup> Generative AI might add another layer to that inquiry. That is, does generative AI further invisibly entrench Western ways of legal writing and exclude other perspectives? If so, what should we do about it?

I suspect that because of the arrival of generative AI, ethical principles, technological skills, and legal doctrine will occupy more of the writing course curriculum than ever before. The field can produce a body of literature that can help faculty integrate these topics into the curriculum.

#### D. How Will We Teach and Assess Legal Writing? Questions of Pedagogy to Explore

Finally, the arrival of generative AI creates urgency for scholars to explore the teaching and evaluation of legal writing in law school. First, law schools may need to adapt legal writing learning outcomes and teaching methods. Being competent in legal writing will likely include, by necessity, being competent with generative AI. Thus, scholars need to advise on what to teach. This advice might include, for

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<sup>59</sup> Steven Ellison, *Rapper Pras Michel Contests Conviction Because of Lawyer's Use of AI*, FINDLAW (Nov. 1, 2023), <https://www.findlaw.com/legalblogs/practice-of-law/rapper-pras-michel-contests-conviction-because-of-lawyers-use-of-ai/>.

<sup>60</sup> See *Litigation, Comparison Table - Federal Court Judicial Standing Orders on Artificial Intelligence*, BLOOMBERG, <https://www.bloomberglaw.com/external/document/XCN3LDG000000/litigation-comparison-table-federal-court-judicial-standing-orde> (last visited Apr. 5, 2024) (reporting standing orders from courts regulating the use of generative AI). Notably, at least some courts are banning its use in documents filed with the court for both attorneys and pro se parties. See, e.g., Hon. Michael J. Newman, *Standing Order Governing Civil Cases*, U.S. DIST. CT.: SOUTHERN DIST. OF OHIO 11, 11 (2023), <https://www.ohsd.uscourts.gov/FPNewman> (“No attorney for a party, or a pro se party, may use Artificial Intelligence (“AI”) in the preparation of any filing submitted to the Court. Parties and their counsel who violate this AI ban may face sanctions including, inter alia, striking the pleading from the record, the imposition of economic sanctions or contempt, and dismissal of the lawsuit. The Court does not intend this AI ban to apply to information gathered from legal search engines, such as Westlaw or LexisNexis, or Internet search engines, such as Google or Bing. All parties and their counsel have a duty to immediately inform the Court if they discover the use of AI in any document filed in their case.”).

<sup>61</sup> See, e.g., ELIZABETH BERENQUER, LUCY JEWEL, & TERI MCMURTRY-CHUBB, *CRITICAL AND COMPARATIVE RHETORIC: UNMASKING PRIVILEGE AND POWER IN LAW AND LEGAL ADVOCACY TO ACHIEVE TRUTH, JUSTICE, AND EQUITY* (2023).

example, how to teach new or amended steps in the writing process and how to give attention to prompt engineering. Scholars will need to guide teachers on what skills students will need to effectively use generative AI. Scholars will need to advise about the limitations on and ethical use of generative AI. I suspect a shift in the balance of which fundamental skills are emphasized in the legal writing classroom. That is, while perhaps no skills will become obsolete (or will they?), some skills will need new emphasis. For example, skills like critical reading, rhetorical analysis of text, and information literacy will be more important than ever for law students. These skills will need greater emphasis in the legal writing classroom. But this is just speculation at this point; the field needs good research to test that hypothesis. The approach to legal writing teaching in the presence of generative AI should be based on rigorous scholarship that collects evidence and generates theory.

Second, legal writing assessments will likely need to change in response to generative AI, and the field will need research and experimentation to this end. Some studies have demonstrated that generative AI can produce passable answers to law school assignments.<sup>62</sup> One study showed that ChatGPT can pass the bar exam.<sup>63</sup> These studies raise the question of whether it would be possible for students to sufficiently complete law school assignments using generative AI and not have actually learned the skills law school is supposed to teach. That is, if generative AI produces a document without the sufficient intellectual investment of a student, is it possible that a student can “pass” an assignment but still fail to accomplish its learning outcomes?

If generative AI can successfully *write for* students without their intellectual investment, this is a serious problem for legal writing courses. Legal writing courses rely almost exclusively on assessments produced *outside of class* in conditions where it would be tempting to use generative AI even if forbidden. If generative AI can write *for* students, a question arises as to whether the “traditional” out-of-class legal writing assessment can still be counted as a reliable, authentic indicator of a student’s capabilities in legal writing. On the other hand, it could be true that generative AI cannot competently produce the typical out-of-class legal writing assignment like a memo or a brief. It is possible that students must intellectually invest in completing the assignment no matter the generative AI use. In that case, it would be true that generative AI does not interfere with students learning legal writing skills, even if generative AI writes every word of a legal writing assignment upon which its use was prohibited.

Another possibility is that even if generative AI use is *permitted* on an assignment, generative AI will “mask” students’ capabilities as to fundamental skills. If that is the case, then legal writing faculty might be incapable of accurately

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<sup>62</sup> Jonathan H. Choi et al., *ChatGPT Goes to Law School*, 71 J. LEGAL EDUC. 387 (2022).

<sup>63</sup> Debra Cassens Weiss, *Latest Version of ChatGPT Aces Bar Exam With Score Nearing 90<sup>th</sup> Percentile*, ABA J. (Mar. 16, 2023, 1:59 PM), <https://www.abajournal.com/web/article/latest-version-of-chatgpt-aces-the-bar-exam-with-score-in-90th-percentile>.

assessing the skill set of students engaged in hybrid human-AI writing. Accordingly, in light of all of this, legal writing faculty might need to develop scholarship exploring AI-resistant or AI-proof legal writing assignments that can authentically distinguish between and assess students' independent skills as writers and students' skills in writing with generative AI.

It might also be true that assessing a traditional written product is no longer the best way to assess some of the skills taught in legal writing. Written products like memos or briefs have given faculty *indirect* evidence of a student's mastery of legal writing skills like critical reading, information literacy, and legal reasoning. But what if the written product no longer provides good quality *indirect* evidence because generative AI interferes with the quality of that evidence? Legal writing teachers may need to develop new, *direct* ways of assessing foundational skills.<sup>64</sup> Good pedagogical scholarship can serve that purpose.

The turn to new assessment types might result in a "writing process renaissance."<sup>65</sup> New assessments that do not rely on a "final" written product (or do not rely on a traditional written product) may help legal writing teachers isolate the steps of the thinking, reasoning, and writing process in ways faculty have not done before. New assessments, grounded in solid research, could reveal whether students rely too heavily on generative AI or rely on it improperly.

Prompting assignments may be one of those new assessments. Prompting might make visible the thoughts and questions legal writers use to guide their writing. If that is true, writing faculty should be able to use those prompts as a window into student thinking. They should be able to see how a student understands rule synthesis, for example, by how the student prompts the large language model to generate a synthesized rule. In a final written product, like a brief, legal writing teachers cannot see the reasoning that led to a well or poorly synthesized legal rule. But it is plausible that prompting as an assessment (not just as a skill) could give direct access to reasoning. This might result in a renewed commitment to process-oriented legal writing courses. Scholarship on "prompting as pedagogy" would be useful to the field and perhaps lead to new ways of not only assessing but also developing foundational hybrid writing skills.

These statements, of course, are largely thoughtful speculation. Research is needed.

Beyond the topics mentioned above, scholars will need to research how generative AI impacts writing assessment and learning in other skills courses like trial advocacy (where, for example, generative AI could be used to write a closing

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<sup>64</sup> See Williams, *supra* note 4, at 46–74 (discussing new assessment techniques).

<sup>65</sup> Well-respected literature in legal writing scholarship documents a "turn" in legal writing that placed new emphasis on the process of legal writing as it exists in a specific discourse community. See Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35 (1994). But perhaps the field's pedagogical and assessment methods keep the emphasis on product over process more than they should. Perhaps the disruption that generative AI brings will cause a reconsideration of what a process approach to legal writing means.

argument); in co-curricular activities, like moot court and law review; and in field placement experiences. All of these involve legal writing and communication, and all need inquiry into the impact of generative AI on their pedagogical practices.<sup>66</sup>

## V. CONCLUSION

I hope I have made a convincing argument that legal writing faculty are well-positioned to research questions where generative AI intersects with legal writing, education, and practice. I have identified many lines of inquiry. But I'm sure I've missed some that already exist and have failed to identify more that will emerge in the future. Nonetheless, there's plenty here already for scholars to be curious about and give attention.

The state of generative AI is constantly changing. While that might be a deterrent for some to begin their inquiry and to wait until things "settle down," scholars in legal writing do not have the luxury of waiting. The field needs to engage in a robust scholarly conversation now. The field's progress in successfully adapting to the presence of generative AI, I think, will be built upon exchanges in scholarly conversation. Some aspects of the conversation will remain canonical for the field. Others will make a brief but significant impact. Regardless, all contributions—big or small, now or later—will be important.

The parlor is open.

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<sup>66</sup> A related question is whether students need to "write to learn." For an overview of "writing to learn" literature, see Mustapha Chmarkh, *Writing to Learn Research: A Synthesis of Empirical Studies (2004-2019)*, 10 EUR. J. OF EDUC. RSCH. 85 (2021). In other words, if students do not do the majority of their "own" writing, can they still learn both the substance and skills of lawyering? For example, if students in an asynchronous distance education Contracts class never write their own discussion board posts—discussion boards being a frequently used method to facilitate asynchronous course class participation, see MARJORIE VAI & KRISTEN SOSULSKI, *ESSENTIALS OF ONLINE COURSE DESIGN, A STANDARDS-BASED GUIDE* 94 (2d. ed. 2016)—and instead have generative AI produce the posts on the students' behalf, will students learn the substance of contracts? Not as well? Not at all?