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# STETSON LAW REVIEW FORUM

## HUMANS AT THE CENTER OF LEGAL WRITING WITH GENERATIVE AI AS AN EVOLVING COMPONENT OF THE LEGAL WRITING PROCESS

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*Responding to A New Parlor is Open: Legal Writing Faculty Must Develop Scholarship on Generative AI and Legal Writing*

### I. INTRODUCTION

In her essay, *A New Parlor Is Open: Legal Writing Faculty Must Develop Scholarship on Generative AI and Legal Writing*, Dr. Kirsten Davis poses a number of questions underlying the assumption that a human is the agent of writing.<sup>1</sup> Specifically, she notes that it has long been assumed, “[h]umans are writing *agents*; machines are writing *tools* to be used by humans.”<sup>2</sup> She then argues that “observing generative AI at work calls into question this assumption.”<sup>3</sup> She suggests that we must now ask, “[w]ho (or what) is at the ‘center’ of legal writing?”,<sup>4</sup> and what it now means “to write.”<sup>5</sup> She focuses particularly on the writing process and how generative AI will affect that process.<sup>6</sup>

Although not articulated as such, fundamental to Dr. Davis’s position is the question, does generative AI write or does it merely produce or generate? In this Article, we argue that generative AI does not write; it produces or generates. This distinction is significant. It is more than a matter of semantics and the distinction

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<sup>1</sup> Kirsten K. Davis, *A New Parlor Is Open: Legal Writing Faculty Must Develop Scholarship on Generative AI and Legal Writing*, 7 STETSON L. REV. F. 1 *passim* (2024).

<sup>2</sup> *Id.* at 6.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 7.

<sup>5</sup> *Id.* at 8.

<sup>6</sup> See generally *id.*

should be maintained. To that end, even as lawyers embrace generative AI, we should not redefine writing to mean producing nor abandon best practices in teaching legal writing. Rather, we should continue to teach novice legal writers how to write for the legal discourse community while acknowledging that one's writing process will likely change by engaging with generative AI. Lawyers will continue to need to know how to write, but such knowledge will include knowing how to work with generative AI-produced text in their writing process.

In responding to Dr. Davis's question, "what does it mean to write?"<sup>7</sup> we first explore legal writing and legal document producing as distinct processes with unique characteristics. We then discuss the benefits of generative AI-produced text and how it can aid the writing process. Next, we explore the risks of treating generative AI-produced text as writing, with an emphasis on the risks to novice legal writers. We then advocate for continuing to teach foundational legal writing skills and incorporating generative AI into that skillset. We conclude by reinforcing the uniquely human aspects of writing and suggest that generative AI should become part of the legal writing process, rather than a replacement for it.

## II. LEGAL WRITING IS DISTINCT FROM LEGAL DOCUMENT PRODUCING

### A. The Process of Legal Writing

"To write is to make choices, word by word, sentence by sentence, paragraph by paragraph. Writers choose what they want to write about, whom they want to write to, and why they're writing."<sup>8</sup> In doing so, the writer exercises personal agency over the text throughout the writing process. To write is to struggle, to grapple with questions and decisions, to compose, delete, edit, and rethink positions or arguments. Writing is "open and exploratory, an act where we determine what we mean to say by attempting to say it."<sup>9</sup> This process of determining what we want to say and how to say it is part of any type of writing,<sup>10</sup> but it is a particularly critical aspect of legal writing where analysis and writing are intertwined. Writing is a heavy lift; it "is difficult, [and] it takes many drafts to realize a finished product."<sup>11</sup>

Embracing this heavy lift is often a struggle for legal writers. The struggle is particularly acute and, arguably, necessary for novice legal writers who are not cognizant of the writing process and not socialized into the discourse community. Novice legal writers are encountering a new culture and language as well as new

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<sup>7</sup> *Id.*

<sup>8</sup> JOHN WARNER, WHY THEY CAN'T WRITE: KILLING THE FIVE-PARAGRAPH ESSAY 5 (2018).

<sup>9</sup> *Id.* at 16.

<sup>10</sup> See Kristen Konrad Robbins-Tiscione, *A Call to Combine Rhetorical Theory and Practice in the Legal Writing Classroom*, 50 WASHBURN L.J. 319, 326 (2011) ("One advantage to teaching analysis and argument as beginning with 'invention' is to signal the creative aspect of the lawyer's process.").

<sup>11</sup> WARNER, *supra* note 8, at 23.

rhetorical preferences.<sup>12</sup> They struggle with new questions of purpose, audience, scope, stance, and ethics. They also struggle with learning interpretive principles and analytical paradigms. The struggles are often manifested in the writing process and are essential to the learning process. Indeed, writing is an integral part of learning.<sup>13</sup> Those struggles lead to understanding, competence, and confidence that can then be used in responding to the next writing task.<sup>14</sup>

The struggle leads many novice legal writers to express frustration in having to write something before they understand how to do it. This feeling is the result of experiencing the difficulties of legal writing. Legal writing does not require mere acquisition of a new language or compliance with writing conventions; rather, it also requires expression and communication of legal knowledge. Legal writing is the product of legal thinking and analysis. In addition to mastering the language of the law, a legal writer must understand hierarchy of authority, must synthesize, not merely summarize, the law, and must demonstrate all steps in their reasoning.<sup>15</sup> Even after learning about the various components of legal analysis, forms of legal reasoning, citation, and legal writing conventions, it is often difficult to put those concepts into practice. The difficulty is not an intentional torture device but rather an indicator that the novice legal writer is struggling with making choices, learning the law, and figuring out what they mean to say by attempting to say it. Within these struggles is where the learning and mastery of the law, the legal analysis, the expression of that analysis, and the expectation of their readers takes place.

In making intentional decisions, writers are figuring things out as they go through the process of trying to communicate what the law means and how it applies in a given situation.<sup>16</sup> That process of thinking while writing can result in some messy writing. But that messy writing is part of the process and may be an integral part of the process. Novice legal writers often struggle with “getting started” because, in

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<sup>12</sup> Jill J. Ramsfield, *Is “Logic” Culturally Based? A Contrastive, International Approach to the U.S. Law Classroom*, 47 J. LEGAL EDUC. 157, 161 (1997).

<sup>13</sup> See *id.*

<sup>14</sup> See Ellie Margolis, *Doing Less—Reflections on Cognitive Load and Hard Choices in Teaching First-Year Legal Writing*, 68 ST. LOUIS U. L.J. 399, 406 (2024) (“In LRW, students learn primarily to write memos and briefs as a vehicle for modes of thinking and processes that they will need to use throughout law school and their careers. The end goal isn’t primarily the product—the format and style of legal writing—but the process of researching, analyzing, and figuring out the best form of communication given the needs of the situation.”).

<sup>15</sup> See Ramsfield, *supra* note 12, at 161–62.

<sup>16</sup> Jacob Taylor, *Pushing Past the First Draft: Exercises in Revision*, in TEACHING AND GENERATIVE AI: PEDAGOGICAL POSSIBILITIES AND PRODUCTIVE TENSIONS 287, 288–89 (Beth Buyserie & Travis N. Thurston eds., 2024) (discussing the revision process and, stating that “[a] writer at the end of their first draft now sees things they did not when they began, letting them ‘drive on’ through another draft by writing what they would have said had they known what they now know at the end of it” (quoting Doug Downs, *Revision Is Central to Developing Writing*, in NAMING WHAT WE KNOW: THRESHOLD CONCEPTS OF WRITING STUDIES 66, 66 (Linda Adler-Kassner & Elizabeth Wardle eds., 2016))).

part, they want that first draft to be the final draft. They don't fully appreciate that writing is iterative; the first draft is not the final draft; legal writing intentionally takes multiple drafts; and that to do anything less than multiple drafts will not have a good outcome. For many novice legal writers, revision has been seen as a correcting process rather than an opportunity for re-seeing.<sup>17</sup> Yet, when they realize that revising is a tool for discovery, a process through which they can make connections that will improve their thinking and writing about complex and nuanced subjects, they are freed from the need to have a perfect first draft.<sup>18</sup> Viewing that messy draft as a path to mastery of the subject should motivate the writer to take more time and to engage more deeply with the text throughout the writing process.

"[W]riting is an emotional as well as a cognitive activity. . . ." <sup>19</sup> Feelings are uniquely human and can lead to nuanced, creative, or new ideas. A writer struggling to refute a counterargument senses its weakness and is forced to rethink their own argument. An analysis that avoids addressing a particular case or assertion leaves the writer feeling unpersuaded and incomplete, prompting the writer to engage in a more thorough analysis of a murky issue. A writer who struggles to "write" their argument realizes the struggle may not be with writing as much as with the argument. The writer's struggle signals a flaw in the writer's thinking or a gap in reasoning. This struggle, these feelings and experiences, prompt the writer to rethink and rewrite.

In addition, a writer's emotional reasons for writing are also woven into the writing process. A writer has various goals or purposes for a particular piece of writing and emotions that go along with trying to satisfy those goals. A writer may want to help a client, impress a boss, or gain self-satisfaction in completing a project. These goals and related emotions are uniquely sentient. A writer can experience joy or frustration in working on a complicated legal analysis, and those feelings are part of the writing process. Those uniquely human feelings may motivate a writer to provide a stronger analysis, a more compelling narrative, or a nuanced approach.

Thinking, grappling with choices, and choosing takes time and effort. Such time and effort often leads writers to seek shortcuts or easier paths. Generative AI is one obvious path that will rob writers of the learning that is an integral part of the writing process. The time-intensive writing process is a challenge for novice legal writers who are not accustomed to the analytical completeness demanded in legal writing and may be used to cranking out papers overnight. Legal analysis does not lend itself to this abbreviated process because to write about the law is to make meaning, not just regurgitate what others have written. Thinking about what the law is, what it means, and how it applies to a given factual scenario is not an all-nighter

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<sup>17</sup> See Susan M. Taylor, *Students as (Re)Visionaries: Or, Revision, Revision, Revision*, 21 *TOURO L. REV.* 265, 278 (2005) ("To revise by re-seeing is to embrace the act of writing as a recursive process during which the writer forms and re-forms his ideas to achieve a goal, such as answering a research question, persuading a judge or advising a client.").

<sup>18</sup> *Id.* at 279.

<sup>19</sup> Susan McLeod, *Some Thoughts About Feelings: The Affective Domain and the Writing Process*, 38 *COLL. COMPOSITION & COMMUN* 426, 426 (1987).

task. It takes time to fully process the law, understand what choices are in play, and put those choices into effect by writing. Time is also needed for taking breaks between drafts, identifying needs for revision and editing, making those revisions and edits, and incorporating feedback.<sup>20</sup>

With time away from the act of writing, writers may experience “a writing epiphany”—an idea that comes seemingly without effort while a project is in progress. For example, if a writer is struggling with how to deal with a fact that weighs against their argument, no matter how long they intentionally try to resolve it by thinking it through and even drafting legal analysis, sometimes forcing it does not work. But letting the project take a backseat in the writer’s mind while they engage in other tasks, even something as simple as taking a shower or going for a walk, writers can find themselves thinking their way to a solution, discovering a nuanced way of engaging with the law, or developing a better understanding of how the various cases on a legal issue fit together.<sup>21</sup> Experiencing the writing process, even the unintentional parts, is essential to writing. These breakthrough moments are also opportunities for the writer to experience professional satisfaction.

## B. The Production of a Document

In contrast to writing, to produce is to “make or manufacture from components of raw materials.”<sup>22</sup> Generative AI produces a document or text by piecing together tokens from its training data that are responsive to prompts.<sup>23</sup> For this reason, it is misguided to think of generative AI as a writer; that characterization is too generous given that writing is making choices. Generative AI produces “text based on what it statistically calculates as the most likely next token in the sequence.”<sup>24</sup> Thus, in responding to prompts, generative AI does not make choices; it does not think. It does not struggle to decide the best way to address a thorny issue or how to minimize a fact. Unlike the writer’s mind that can process ideas, conflicts, and questions to come to an intentional resolution, generative AI spends no time letting ideas germinate.<sup>25</sup>

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<sup>20</sup> For research that supports the idea that taking breaks can enhance creativity, reduce mental fatigue, and improve problem-solving, see Ut Na Sio & Thomas C. Ormerod, *Does Incubation Enhance Problem Solving? A Meta-Analytic Review*, 135 PSYCH. BULL. 94 *passim* (2009) (finding that incubation periods can enhance creative problem-solving, as the subconscious mind continues processing information during breaks). For a discussion of the value of revision in a recursive view of writing, see Taylor, *supra* note 17, at 276.

<sup>21</sup> Benjamin Baird et al., *Inspired by Distraction: Mind Wandering Facilitates Creative Incubation*, 23 PSYCH. SCI. 1117, 1117–22 (2012) (discussing empirical research that demonstrated how engaging in simple external tasks that allow the mind to wander facilitates creative problem solving).

<sup>22</sup> *Produce*, GOOGLE’S ENGLISH DICTIONARY, <https://www.google.com/search?q=produce+definition> (last visited Apr. 12, 2025).

<sup>23</sup> See ETHAN MOLLICK, CO-INTELLIGENCE: LIVING AND WORKING WITH AI 9 (2024).

<sup>24</sup> *Id.*

<sup>25</sup> See ABA Comm. on Ethics & Prof’l Resp., Formal Op. 512 (2024) (“[Generative AI] tools lack the ability to understand the meaning of the text they generate or evaluate its context.”).

It does not create meaning. It responds to a user's prompts with consistently average output based on its raw material inputs.<sup>26</sup> Generative AI's responsive text is thus produced rather than written, within the limitations of the generative AI program, its training data, and the prompts.

There are several other characteristics of generative AI that demonstrate how it is a producer rather than a writer. Generative AI's speed reflects its role as producer. It can generate legal analysis in seconds or minutes, significantly faster than even an expert legal writer. Generative AI is trained to prioritize concision and other forms of correctness over nuanced, sophisticated written communication.<sup>27</sup> Furthermore, generative AI's output can be misleading because the process is hidden.<sup>28</sup> Generative AI does not have any goals or purposes; it does not care about anything because it is not sentient. Generative AI does not experience joy nor frustration in solving a complex question of legal analysis. This lack of emotional engagement with the process further demonstrates how generative AI is a producer, not a writer, of text. Though we are not concerned that generative AI has no emotions, the lack of expressed emotion for human writers could foreclose creative and intentional thinking required in the rhetorical gray spaces of legal analysis or in trying to tailor legal analysis to a particular client's needs. Relying on generative AI to produce text risks eliminating or intercepting those creative and intentional thinking experiences.

Law is indeterminate and subject to interpretation and application, but generative AI's output suggests otherwise.<sup>29</sup> Given the speed and seeming legitimacy of generative AI produced text, the output that "looks right" may suggest that the law is determinative, that there is only one answer to a given question or prompt. In

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<sup>26</sup> MOLLIK, *supra* note 23, at 108 (explaining that generative AI "tends to give the crowd-pleasing 'average' answer that is most likely from its training data"); *see also id.* at 9 (explaining that large language models are predicting text by "analyzing a piece of text and predicting the next token, which is simply a word or part of a word. . . . [Generative AI] keeps writing text based on what it statistically calculates as the most likely next token in the sequence.").

<sup>27</sup> *See* Mark K. Osbeck, *What Is "Good Legal Writing" and Why Does It Matter?*, 4 DREXEL L. REV. 417, 427, 465 (2012) (identifying "the three fundamental qualities" of "good legal writing" as clarity, conciseness, and "the ability to engage the reader" and arguing that "great legal writing exhibits a fourth fundamental quality—elegance—that is aesthetic in nature"). Although prompting could reprioritize generative AI's output, any re-prioritization would require intentional prompting skills, and the user would have to define the new priorities.

<sup>28</sup> This hidden process is particularly troublesome given that "[l]egal writing is an inherently social activity in which the legal writer puts pen to paper in order to have a certain effect on a target audience." *Id.* at 423.

<sup>29</sup> Robbins-Tiscione, *supra* note 10, at 337–38 (discussing the experience of novice legal writers when they "realize legal writing is not as straightforward as it seemed. . . . It becomes clear that in legal writing, at least, the rule of law is not fixed; it can be articulated in a number of ways").

producing “correct” text almost instantly, generative AI at least suggests that there is one right legal analysis to the exclusion of alternatives.<sup>30</sup>

In relying on generative AI to produce text, human writers lose the opportunity to make choices, an essential part of writing. In writing legal analysis, the writer must make a number of choices after robust legal research: choosing which authorities to use in the writing and which to leave out, how to present the governing law, which conclusion to reach and how to support it, and which forms of legal reasoning to use in justifying conclusions. By using generative AI, these choices may be essentially eliminated because generative AI produces something that “looks right,” especially to the novice legal writer who does not yet have the skills to evaluate generative AI’s output. In this way, a writer becomes a “user” of generative AI to produce a text. Because generative AI produces grammatically correct, consistently average text, the user can be easily misled into thinking there is no need to do anything further. When misled in this way and thus accepting generative AI’s output as a final product, legal writers forgo the opportunity to rethink and revise their writing.

### III. BENEFITS AND RISKS OF GENERATIVE AI

#### A. Benefits of Generative AI

Whether characterized as writer or producer, the reality is that generative AI is a technology that strives to do many of the things that lawyers do every day, including legal research and writing tasks.<sup>31</sup> In fact, it has been trained to understand and generate human-like writing.<sup>32</sup> Generative AI can generate text and documents far more efficiently than most people. In the span of a few minutes, generative AI can answer a legal question and generate a document that communicates that answer. What might take a novice legal writer many hours to research and write takes generative AI mere minutes. According to Ethan Mollick, “[e]arly studies of the effects of AI have found it can often lead to a 20 to 80 percent improvement in productivity across a wide variety of job types, ranging from coding to marketing.”<sup>33</sup> Such improved productivity applies to writing tasks.<sup>34</sup> For example, in the first randomized

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<sup>30</sup> See Dorottya Sallai et al., *Approach Generative AI Tools Proactively or Risk Bypassing the Learning Process in Higher Education*, LSE PUB. POL’Y REV. Nov. 2024, at 6 (“The convincing tone of the GenAI chatbots’ responses seems to give students the illusion that the output is always factual and true.”).

<sup>31</sup> See ABA Comm. on Ethics & Prof. Resp., *supra* note 24, at 1 (“GAI tools may assist lawyers in tasks such as legal research, contract review, due diligence, document review, regulatory compliance, and drafting letters, contracts, briefs, and other legal documents.”).

<sup>32</sup> MOLICK, *supra* note 23, at 10.

<sup>33</sup> *Id.* at xvii.

<sup>34</sup> Joe Regalia, *From Briefs to Bytes: How Generative AI Is Transforming Legal Writing and Practice*, 59 TULSA L. REV. 193, 197 (2024) (noting that a large study of college-educated people revealed that writing efficiency “drastically improved when using ChatGPT versus a control group”).

controlled trial to study the effect of AI assistance on human analysis, Professors Choi, Monahan, and Schwarcz found that “access to GPT-4 only slightly improved the quality of participants’ legal analysis” but “consistently induced large declines in the amount of time taken to complete tasks.”<sup>35</sup> The benefits of such efficiency are many. Less time spent on research and writing frees up time for law students and lawyers to work on other projects. This efficiency may also mean fewer billable hours, savings for clients, and potentially increased access to legal services.<sup>36</sup>

In addition to efficiency, generative AI also demonstrates increasing competency. Some claim that generative AI can now “understand text, parse it for insights, and apply those insights with striking competence.”<sup>37</sup> Others have made even more striking claims: a March 2023 paper published by a team of Microsoft researchers claims that “GPT-4, the latest and most powerful language model produced by OpenAI,” has “the ability to perform any intellectual task that a human can do.”<sup>38</sup> Although the breadth of the paper’s claims were criticized by other researchers and scientists, a number of studies have shown that generative AI can complete a number of tasks competently and even perform satisfactorily on different types of exams.<sup>39</sup>

Notwithstanding disagreement about the quality of AI-generated text, many agree that generative AI can produce text comparable to, if not better than, that produced by novice legal writers.<sup>40</sup> Notably, the quality of the document produced improves with better prompting. Thus, as law students and lawyers become more adept at prompting, the document produced is likely to improve. Additionally, as Ethan Mollick reminds us, we should assume that this is the worst AI we will ever use,<sup>41</sup> and presumably the text generated by generative AI will also improve.

Generative AI may help level the playing field for both struggling legal writers and the public at large because it can quickly and somewhat competently produce text. In terms of struggling legal writers, use of generative AI allows a writer to overcome the blank page syndrome that plagues many who don’t know where or how to start writing. Additionally, studies have shown that use of generative AI tends to be most helpful to lower-skilled participants.<sup>42</sup> With respect to specific legal tasks, Choi’s study found that the benefits of AI assistance were uneven.<sup>43</sup> For tasks on which generative AI was most useful, it was significantly more useful to lower-skilled participants, whereas “AI assistance reduced the amount of time that participants

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<sup>35</sup> Jonathan H. Choi, et al., *Lawyering in the Age of Artificial Intelligence*, 109 MINN. L. REV. 147, 153 (2024).

<sup>36</sup> *Id.* at 158–59.

<sup>37</sup> Regalia, *supra* note 34, at 196.

<sup>38</sup> MOLICK, *supra* note 23, at 86.

<sup>39</sup> See Choi et al., *supra* note 35, at 160–62.

<sup>40</sup> See Regalia, *supra* note 34, at 213, 218 n.10.

<sup>41</sup> MOLICK, *supra* note 23, at 60.

<sup>42</sup> Choi et al., *supra* note 35, at 170.

<sup>43</sup> *Id.* at 153.



took to complete the tasks roughly uniformly. . . .”<sup>44</sup> Extrapolating from these results suggests that relying on generative AI will be more helpful to the struggling or weak legal writer. By allowing weaker legal writers to achieve better results, generative AI benefits both the legal writer and the client served by that legal writer.

If generative AI can produce satisfactory results, why continue to force law students to engage in the laborious process of writing when we know that there is a ready tool that can significantly enhance their efficiency and, in the case of lower-skilled students, improve their output? As tempting as it may be, we cannot allow legal writing to be transformed into mere production because doing so will deprive novice legal writers of the ability to develop critical thinking skills and will lower the overall quality of legal writing.

### B. Risks of Treating Generative AI-Produced Text as Writing

Even though generative AI offers potential benefits and produces acceptable text, we should not consider that text as “writing.” Doing so suggests that generative AI has engaged in critical thinking, decision making, and a writing process. It has not. Rather, we should think of generative AI as a helpful assistant (or as Mollick suggests, a co-intelligence<sup>45</sup>) with whom we need to engage and who we need to supervise throughout our writing process.<sup>46</sup> In thinking about generative AI this way, we can consider its products as informing the writing process rather than replacing the writing process. In this section, we discuss several risks of considering generative AI’s output as writing, especially for novice legal writers.

Thinking of generative AI-produced text as writing anthropomorphizes AI. Doing so suggests that generative AI is thinking, creating, and making choices as a sentient person would do. Yet, we know that generative AI is not doing so. Thinking of generative AI as equivalent to a human is problematic in eliminating the need for personal agency in written communication. Instead of ceding agency to generative AI, we should ensure that we remain the “human in the loop”<sup>47</sup> as we engage with generative AI as part of the writing process. Yet this very engagement with generative AI poses a risk that novice legal writers may delegate writing to generative AI rather than embrace a new writing process that requires both human and generative AI engagement.

The speed and conviction with which generative AI produces text, as well as the basic competence of generative AI-produced text, creates a risk that novice legal writers will be less likely to remain the human engaged in the writing process; such risk has harmful consequences. Novice legal writers will likely question why they should engage in a laborious prewriting and writing process when generative AI provides a shortcut. Yet, this shortcut, generative AI, allows a novice legal writer to

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<sup>44</sup> *Id.* at 153.

<sup>45</sup> See MOLLICK, *supra* note 23, at 52–54.

<sup>46</sup> See ABA Comm. on Ethics & Prof. Resp., *supra* note 25, at 10–11 (discussing duty of supervision and its implications for the use of generative AI tools by lawyers).

<sup>47</sup> MOLLICK, *supra* note 23, at 52.

produce a document with little engagement. This lack of engagement shortchanges the writer's learning, shielding the writer from analyzing and synthesizing information.<sup>48</sup> A novice legal writer relying on generative AI to produce a document will make few decisions and will not engage deeply with the text.

Instead, the writer's choices are limited to what to ask for in the prompt and how to evaluate the output. In fact, prompting may be considered a skill that one can develop if one engages more deeply with generative AI.<sup>49</sup> Careful prompting is one way for the writer to remain the human in the loop. Yet, without training and engagement, a novice legal writer may not know enough to draft effective prompts. Their ability to write effective prompts will necessarily be limited by their lack of foundational knowledge and skills in legal analysis and writing. This foundational knowledge is essential to effective prompt-writing because it is not possible to tell a machine how to do something without an understanding of how to do it. However, as generative AI continues to improve, this lack of foundational knowledge and novice prompting will not necessarily prevent generative AI from producing a final document that "looks good." For example, even if a novice legal writer does not fully explain all aspects of the rhetorical situation when prompting a generative AI tool to produce "a legal memo," generative AI will produce something that looks like a legal memo because generative AI was trained on a dataset that includes actual legal memos.<sup>50</sup>

Given the novice legal writer's limited experience and lack of foundational skills, there are also limitations on a novice legal writer's ability to evaluate the generative AI product. Though most law students have heard of hallucinations and the lawyers who were sanctioned for including fictional cases in their court filings,<sup>51</sup> the significance of those problems suggests a need to check authority but glosses over the need to check—that is, critically examine—the analysis itself. Because generative AI provides responses with such conviction and has been trained on legal material, its product will "look right" even to an experienced lawyer. Indeed, its appearance has the potential to suggest that the produced text has more authority than it actually

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<sup>48</sup> Taylor, *supra* note 17, at 282 (discussing Donald H. Graves' "arguments for the importance of writing as an effective tool") (citing Donald H. Graves, *Balance the Basics: Let Them Write* 6–9 (Ford Found 1978)).

<sup>49</sup> Kirsten K. Davis, *Prompt Engineering for ChatGPT Can Improve Your Legal Writing—Even if You Never Use ChatGPT*, APP. ADVOC. BLOG (Apr. 6, 2023), [https://lawprofessors.typepad.com/appellate\\_advocacy/2023/04/prompt-engineering-for-chatgpt-can-improve-your-legal-writing-even-if-you-never-use-chatgpt.html](https://lawprofessors.typepad.com/appellate_advocacy/2023/04/prompt-engineering-for-chatgpt-can-improve-your-legal-writing-even-if-you-never-use-chatgpt.html); Regalia, *supra* note 34, at 212–13.

<sup>50</sup> For example, Lexis+AI offers a generate a draft tool that allows users to ask the tool to generate a legal argument, a legal mem, a letter, an email or a clause. According to Lexis+, the draft will conform to standard formatting conventions, simplifying the design process so users can focus on the substance. Jake Nelson, *How Lexis+ AI Can Help You Write Legal Memos Faster*, LEXISNEXIS (Apr. 3, 2024), <https://www.lexisnexus.com/community/insights/legal/b/product-features/posts/how-lexis-ai-can-help-you-write-legal-memos-faster>.

<sup>51</sup> See, e.g., *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443 (S.D.N.Y. June 22, 2023).

has because generative AI prioritizes output and correct form over the substance itself. Thus, a novice legal writer with little experience is likely to accept the substance (even if not citations) of generative AI-produced text as “correct.”<sup>52</sup>

Generative AI also potentially misleads novice legal writers into thinking that legal writing is something to be produced rather than something to be invented by a thoughtful process, which stunts a lawyer’s growth. The efficiency with which generative AI produces text and the form it takes sends the wrong message to novice legal writers is at odds with instruction they receive: legal writing is challenging, takes time, and has no single “right” answer. Generative AI can suggest that legal writing is easy, formulaic, and requires a certain form or structure. Given that novice legal writers often want an easy, formulaic structure within which to write, a machine that reinforces that approach will be at odds with ushering novices into the discourse community.<sup>53</sup> For a novice legal writer relying on generative AI output, there are far fewer choices to make and far fewer opportunities to develop their voice as members of the legal discourse community. Novice legal writers may lose—or never learn—agency and autonomy in their writing process if they are convinced that “answers” exist, and generative AI can produce them.

Legal writing professors balance teaching legal writing conventions with the creativity and inventiveness of legal analysis. As novice legal writers become socialized in the discourse community, it is the experiences and the feedback they receive on their choices that help them learn and develop as lawyers.<sup>54</sup> Generative AI potentially minimizes the need for inventiveness by generating text that emphasizes structural format over substantive analysis by “looking right.” This characteristic of generative AI text, that it “looks right,” elevates arrangement over invention, misleading a novice legal writer into thinking the form or structure of a particular written communication is more important than the substantive analysis. The risk is suggesting to novice legal writers that structure should be prioritized rather than used to reinforce and support substantive analysis.

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<sup>52</sup> E.g., LexisNexis, <https://www.lexisnexis.com/lawschool/lsp/p/studenthome.aspx?lc=LawSchoolPortal/Signin> (last visited May 14, 2025) (select “Go to Lexis+”; click “Protégé”; select “draft”) (exact prompts and outputs on file with authors). In one example, when prompted to “draft a memo” with the basic facts and governing jurisdiction, Lexis+ AI produced the response “needs further legal analysis.” A novice legal writer may simply accept the conclusion “needs further legal analysis” as a legitimate conclusion, whereas a supervisor almost certainly would not. Furthermore, a novice legal writer may misunderstand the purpose of committing to and justifying a decision because generative AI’s “needs further legal analysis” output “looks right.”

<sup>53</sup> Joseph Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING 1, 24–30 (describing the stages of socialization into the legal discourse community as “pre-socialized writer,” “socialized writer,” and “post-socialized writer”).

<sup>54</sup> Margolis, *supra* note 14, at 406 (“Cognitive science research . . . shows that working through difficult problems rather than being told ‘how to’ aids in deep learning and skill transference.”).

Generative AI produces consistently average text with invisible biases baked in.<sup>55</sup> For the novice legal writer, these biases may be unrecognizable because of their lack of experience, and relying on generative AI may “teach” the novice legal writer to write text like the text generative AI produces—again, because it “looks correct.”<sup>56</sup> Indeed, “because these biases seem to come from an objective machine, they can be especially pernicious.”<sup>57</sup> Of course, legal writers also have their own biases, but they may be able to check themselves in ways that they would not necessarily think to question generative AI’s text.

Generative AI is necessarily limited by prompting and its inputs while the human brain has potentially unlimited choices based on time, knowledge, and resources. On the other hand, generative AI may be more creative than the human brain in that it can bring together varied concepts in ways a human would not consider. In that situation, a novice legal writer might submit an AI-produced novel argument to a supervisor or court but have no idea of how to explain the basis for that idea or engage in a conversation exploring the idea further, which could potentially make them lose credibility. Without the opportunity to think through a legal issue, novice legal writers as users of generative AI risk losing credibility.

Finally, relying on generative AI undermines professional identity formation for novice legal writers and junior lawyers. The experience of writing is a central part of professional identity formation: a “lawyer’s writing, whether public or private, becomes a representation of the lawyer in the world.”<sup>58</sup> Lawyers develop reputations based on their written work and how they engage with clients, supervisors, colleagues, and judges. The potential to develop a bad reputation or a false reputation exists for new writers who may over-rely on generative AI. If a novice legal writer merely submits work that is generative AI-produced text and represents it as their own work, there is a loss of professional identity formation. As Shelley Kiersted and Erika Abner explained, “[l]awyers must develop an authoritative stance as professionals, and they develop an authoritative stance and professional identity in the course of the preparation of documents in the service of clients.”<sup>59</sup> By over-relying

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<sup>55</sup> MOLLICK, *supra* note 23, at 35 (“[T]he data itself is limited to what primarily American and generally English-speaking AI firms decided to gather. And those firms tend to be dominated by male computer scientists, who bring their own biases to decisions about what data is important to collect.”).

<sup>56</sup> *Id.* at 35–36 (“[T]he biases in advanced LLMs are often more subtle, in part because the models are fine-tuned to avoid obvious stereotyping. The biases are still there, however. . . . [G]enerative AI can create a distorted and biased representation of reality. And because these biases come from a machine, . . . they can both seem more objective and allow AI companies to evade responsibility for the content.”).

<sup>57</sup> Ethan Mollick & Lilach Mollick, *Instructors as Innovators: A Future-Focused Approach to New AI Learning Opportunities, with Prompts*, 6 (Apr. 21, 2024) (unpublished manuscript) (available at, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4802463](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4802463)).

<sup>58</sup> Shelley Kierstead & Erika Abner, *Text Work as Identity Work for Legal Writers: How Writing Texts Contribute to the Construction of a Professional Identity*, 9 LEGAL COMM. & RHETORIC 327, 330 (2012).

<sup>59</sup> *Id.* at 329.

on generative AI-produced text, or by relying on generative AI too soon without an understanding of how to engage generative AI in their writing process, novice lawyers may struggle to define their professional identities, leading to a misunderstanding of their role and potentially undermining their potential to add value.

Given the potential benefits and risks of using generative AI in legal writing, we should consider how to respond in teaching novice legal writers. Although it may be easier to ignore technology and stick to fundamentals, that would be a disservice to our students. Instead of ignoring the implications of generative AI, we should develop ways of incorporating it into the writing process and into our teaching of the writing process.

#### IV. INCORPORATING GENERATIVE AI INTO THE LEGAL WRITING PROCESS AND LEGAL EDUCATION

##### A. Embracing Generative AI as Part of the Legal Writing Process

The ability to engage in legal analysis and communicate that analysis to legal readers is fundamental to a lawyer's role. By engaging in the research, writing, and analytical processes, one develops one's lawyering skills and defines one's professional identity. Thus, it is critical that novice legal writers do not delegate wholly these tasks to generative AI. Yet, given the efficiency and increasing abilities of generative AI, lawyers need to understand how to best incorporate generative AI into their workflow.<sup>60</sup> Legal writers, particularly novice legal writers, should consider how to incorporate generative AI into their analytical and writing processes. When and how to incorporate generative AI into one's work, particularly one's writing process, will differ depending on the user's status, level of expertise, and type of practice.

For example, practicing attorneys well versed in the substance and conventions of their practice areas are better able to evaluate generative AI's product and, thus, may incorporate generative AI more readily and efficiently into all stages of their writing process. Experienced attorneys are more likely cognizant of their strengths and weaknesses as writers and of the stages of the writing process that are more problematic for them. Such knowledge allows them to better determine when and how to incorporate generative AI into their writing process.

In contrast, novice legal writers, especially law students, are not as cognizant of their strengths and weaknesses as legal writers. In fact, first year law students are only becoming socialized into the legal discourse community,<sup>61</sup> and they are just learning to become legal writers. They have insufficient experience with their own legal writing process and may be less likely to understand how best to incorporate generative AI into their writing process. Using generative AI without the experience to understand how and why to use it may suggest that the writer is a socialized

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<sup>60</sup> See ABA Comm. on Ethics & Prof. Resp., *supra* note 25, at 2–3 (recognizing that lawyers “must have a reasonable understanding of the capabilities and limitations” of generative AI).

<sup>61</sup> Williams, *supra* note 53, at 24–25.

member of the legal discourse community, but it may actually mask ongoing pre-socialization. Even upper-level law students who may be better able to assess their writing strengths and weaknesses are not yet proficient legal writers and are still experimenting with different legal writing genres. Against this backdrop, legal writing faculty are debating how to best ensure that law students can engage effectively with generative AI before they graduate and begin practicing law.

A review of course policies shows a range of approaches.<sup>62</sup> The spectrum ranges from outright prohibition to full embrace. Some faculty prohibit first year law students from using generative AI in their legal research and writing coursework. Some faculty prohibit the use of generative AI on graded assignments but incorporate the use of generative AI into some class exercises. Some faculty allow the use of generative AI but limit it to specific assignments; others allow the use of generative AI for research purposes but not writing purposes. Some faculty allow the use of generative AI on all assignments; some encourage the use of generative AI on assignments; and some even require the use of generative AI on some assignments. Some, but not all, faculty who permit the use of generative AI require disclosure notices in which the writer must disclose how generative AI was used when completing the assignment. Others allow the use of generative AI but prohibit students from sharing prompts with each other.

### B. Including Generative AI Within Legal Education

If a goal is to ensure that lawyers remain the “human in the loop” engaging with generative AI, then law students need an opportunity to work with generative AI. Novice legal writers need to understand how to incorporate generative AI into their writing process to produce high-quality documents. Students need to learn if and when it would be best to use generative AI in the pre-writing stage as they conduct preliminary research and brainstorm ideas. Should they consult generative AI similar to how they would consult a secondary source? Should they prompt generative AI to think outside the box and come up with a creative approach? Students also need to consider whether and how to incorporate generative AI into the writing and re-writing process. Should they ask generative AI to produce a draft that they will then revise? Or should they put thoughts on paper and then ask generative AI to revise their writing? Students need to practice using generative AI in a controlled environment with guardrails in place so that they can determine how best to use it in their writing. Law school is the place to do so.

As part of this process, faculty need to prepare students to engage in the human-generative AI writing process such that the student adds value to the ultimate product. If generative AI can efficiently produce a text that is comparable to that of a novice legal writer, then why should law firms continue to employ novice legal writers? To be the value added to a document, a legal writer must go beyond

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<sup>62</sup> E.g., Lance Eaton, *Syllabi Policies for AI Generative Tools*, [https://docs.google.com/document/d/1RMVwzjc1o0Mi8Blw\\_-JUTcXv02b2WRH86vw7mi16W3U/edit#heading=h.1cykjin2vg2wx](https://docs.google.com/document/d/1RMVwzjc1o0Mi8Blw_-JUTcXv02b2WRH86vw7mi16W3U/edit#heading=h.1cykjin2vg2wx) (Mar. 31, 2025).

generative AI's consistently average product. Law faculty should emphasize that "while GenAI tools can make certain tasks quicker, accessing the tools does not replace the deep subject knowledge and judgment of a human expert."<sup>63</sup>

Generative AI's consistently average product will look like most legal analysis. The analysis component of most legal documents, be it the discussion in a predictive memo or the argument in a persuasive brief, usually adheres to certain principles and employs an analytical paradigm.<sup>64</sup> Organizationally, legal analysis is often organized around the law and the reader is introduced to this schema in an introductory or roadmap paragraph that provides the context for the legal issue and sets out the overarching rule of law. Topic sentences that use language paralleling the legal terms used in the roadmap help guide the reader through the analysis. And mini conclusions signal that the analysis of an element or issue has concluded. Substantively, legal readers generally expect the issue or conclusion to be stated at the outset, followed by a statement of the governing rule. After stating the law or rule, the legal writer may need to explain the law and then will apply the law to the facts using varied forms of legal reasoning.

There are numerous ways to present legal analysis and students often struggle with constructing an effective legal analysis. To help struggling first year law students understand the reader's expectations, faculty use analytical paradigms or formulas, such as IRAC, CRAC, CREAC, TREAC, TREAT, or CRuPAC, as a starting point to guide students.<sup>65</sup> Novice legal writers often rely too heavily on formulas instead of letting the formulas serve as a baseline or guide to focus them in the right direction. Instead of understanding the purpose of each part of the formula so that they can vary or ignore the formula when there are better choices, novice legal writers often blindly follow the formula. Adhering to a formula requires less thought and engagement; it also generally ensures a basic, satisfactory simple analysis. But blindly following a formula will not be as effective when engaging with a complex legal issue.

If restricted by a formula, legal writers and generative AI will produce legal analysis that is too simple. Having been trained on many legal documents, most text produced by generative AI will adhere closely to one of the formulas, thus reinforcing novice writers' preference for or comfort with formulaic writing. To add value to generative AI text, a legal writer must move beyond blind adherence to a formula and draft something that is more than average.

In incorporating generative AI-produced text toward a final product, the legal writer must do more than merely insert parts into a formula. The legal writer must engage with generative AI, using prompts that explain the rhetorical situation, evaluating the text provided, and asking follow-up questions. Through this iterative

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<sup>63</sup> Sallai et al., *supra* note 30, at 3 (calling on educators to "ensure [students] acquire knowledge, expertise, and intellectual capability").

<sup>64</sup> Diana R. Donahoe, *Constructing Legal Analysis*, TEACHINGLAW.COM 1, <https://teachinglaw.com/book/export/html/1876> (last visited Oct. 4, 2024) (password required for e-book) (on file with authors).

<sup>65</sup> *Id.*

process, the legal writer can make conscious choices about the purpose and stance of the document as well as the document's audience. Additionally, the legal writer can evaluate the sources cited by generative AI. By doing so, the legal writer is the human in the loop, the writer engaging with generative AI to make choices and write sophisticated analysis.

Just as there is no single right answer in legal analysis, there is no single right time to introduce generative AI to novice legal writers. Even so, all law students should be exposed to generative AI tools in the first-year legal research and writing curriculum and given opportunities to engage and experiment with generative AI tools in upper-level writing courses. This initial exposure and engagement should happen in the law school environment, a setting within which students can be guided.<sup>66</sup> With faculty guidance, students can make and learn from mistakes at no cost to a client or employer. Exposure to and practice with generative AI will add to students' readiness for law practice.

As noted earlier, a writer is better able to work with generative AI when that writer understands both the law and the components of a strong legal analysis well enough to evaluate the generative AI product. Law students do not start law school with such understanding. In fact, first-year law students are often overwhelmed by the amount of new knowledge and foundational skills they are expected to master.<sup>67</sup> Adding generative AI and prompt engineering to that load may undermine a student's ability to grasp the foundational skills. In a class that is already covering too many topics and skills, when and how can one introduce these new topics and skills? Moreover, should one even try to introduce these new skills before a student has mastered the foundational building blocks of research, analysis, writing, and organization? Without such a foundation, it is unlikely that a novice legal writer can effectively engage generative AI. As research indicates, "students benefit most from using GenAI tools when they clearly understand a task's purpose and have already grasped the basic underlying concepts needed to complete it."<sup>68</sup> Moreover, introducing generative AI too early in a legal writing course may send the wrong message that the product matters more than the process.<sup>69</sup>

Alternatively, if done effectively, engaging with generative AI may enhance a student's metacognition, which is critical for student's long-term retention and transferability of knowledge.<sup>70</sup> Cognitive science research shows that students need to develop an awareness of how they learn and apply that awareness to new situations.<sup>71</sup> Learning how the use of generative AI may aid their writing process and learning how to craft effective prompts reflects an awareness of their writing process

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<sup>66</sup> See Sallai et al., *supra* note 30, at 3 (explaining that "AI can enhance students' linguistic abilities and serve as teaching assistants," and that teachers "may need to mentor and guide students more closely in navigating conflicting sources of information").

<sup>67</sup> See Margolis, *supra* note 14, at 400.

<sup>68</sup> Sallai et al., *supra* note 30, at 5.

<sup>69</sup> See Margolis, *supra* note 14, at 407–08.

<sup>70</sup> *Id.* at 406.

<sup>71</sup> *Id.*



and of the qualities of effective writing. To enhance the quality of generative AI-produced text, a user must craft prompts that essentially teach the tool how to write. By doing so, the user will have gained the deep learning needed for metacognitive skills.<sup>72</sup> As generative AI improves and its use becomes more widespread, engaging with generative AI may become a foundational skill or one of the building blocks of a legal writing course that is prioritized. If so, there may be a need to redesign other components of the course given limits on instruction time or perhaps generative AI tools will create efficiencies that can be built into a writing course to cover more content. There may also be a need to redesign the legal writing curriculum (both first year and upper level) if generative AI creates new foundational concepts for legal communication. Though generative AI may create some room for efficiencies, incorporating generative AI into the legal writing curriculum should not replace the foundational skills of researching, analyzing, writing, and organizing. It should complement the instruction of such skills.

At this point in the development of generative AI, there is no one right answer for when and how to incorporate generative AI into a legal writing course.<sup>73</sup> But there is a right answer as to whether to incorporate it: the answer is yes. This means faculty must “develop the necessary literacy to guide [students] in their usage and understanding of AI.”<sup>74</sup> Furthermore, faculty must recognize that “GenAI will impact their teaching practices, even if they do not incorporate these tools in their courses.”<sup>75</sup> Avoiding generative AI will not help faculty nor students. By directly engaging with generative AI tools, faculty can “guide students safety and adequately using GenAI tools as part of their learning process, [and] counteract the potential pedagogical distraction these systems pose to the educational system.”<sup>76</sup> Given that law students will almost certainly be expected to use generative AI tools in practice and legal education’s commitment to preparing students for practice, faculty should teach students “how to use these tools responsibly, critically, and safely.”<sup>77</sup> Sending law students into practice with no understanding of how and when to best use generative AI is a failure of mission for any law school.

There may be lots of variables at play for any institution or legal writing course, but those variables should not stand in the way of preparing students for practice, a practice that is very likely to include, if not require, generative AI tools. For example, is a student required to take an advanced practice-based writing course

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<sup>72</sup> See Mollick & Mollick, *supra* note 57, at 25 (discussing how incorporating teaching opportunities for students can be an effective way to promote deeper learning and understanding).

<sup>73</sup> See Sallai, et al., *supra* note 30, at 3 (discussing the unanswered questions and challenges related to curriculum development needs to “equip future graduates with the necessary skills to thrive in a future dominated by artificial intelligence”). The authors urge higher education institutions to “proactively create an environment to explore how AI enhances human intelligence.” *Id.*

<sup>74</sup> *Id.* at 9.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

or can a student graduate law school having only taken the first year required legal research and writing course? If the latter, then exposure to generative AI at some point during the first-year course is necessary. Alternatively, law schools may want to develop an upper-level writing curriculum that includes generative AI rather than relying on a first-year course. The answer will also likely change as incoming law students arrive with greater knowledge of and experience with generative AI. At a minimum, however, novice legal writers need to understand how to engage with generative AI such that the human writer remains at “the center of legal writing.”<sup>78</sup>

## V. CONCLUSION

With the advance of generative AI, Dr. Davis questions the assumption “[h]umans are writing *agents*; machines are writing *tools* to be used by humans.”<sup>79</sup> Although preliminary observations of generative AI may support raising such a question, it is premature and harmful to crown generative AI a “writer.” Writing is a conscious exercise that reflects a series of choices made by the writer. Although generative AI produces text that models or mimics human writing, it does not have the ability to make conscious choices. The generated text reflects an algorithmic prediction of word placement and order; it is not the product of deliberative reasoning.

Generative AI is a powerful tool that is likely to become even more powerful. As such, there are many roles that generative AI can play in legal education and in law practice. It can be an evaluator, coach, mentor, tutor, teacher, agent, co-pilot, and co-creator.<sup>80</sup> It should not, however, be the “writer” or the sole entity at the center of legal writing.<sup>81</sup> Rather, it should continue to be viewed as a powerful tool to be incorporated into the writing process. The human writer is at the center of legal writing and should remain so. Nonetheless, the human writer may share that center with generative AI especially if the writer has learned how to use generative AI to enhance their own writing and to evaluate text produced by generative AI.

Learning how to share that “center” with generative AI and how to incorporate generative AI into the writing process are challenges for all legal writers, especially novice legal writers. Facilitating such learning is a challenge for law faculty, especially those teaching legal writing. To date, faculty have responded to this challenge in widely divergent ways. Some are using generative AI and encouraging their students to use it, but others are prohibiting such use. Even though we do not advocate for a one-size-fits-all approach, we believe that novice legal writers need to be exposed to generative AI so that they can develop an understanding of how best to use it in their writing process. Generative AI may help students develop as legal writers. Generative AI may be a tool used by the legal writer, an assistant aiding the legal writer, or even an agent of the legal writer. It should not be considered the legal

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<sup>78</sup> See Davis, *supra* note 1, at 7.

<sup>79</sup> *Id.* at 6.

<sup>80</sup> Mollick & Mollick, *supra* note 57, at 3.

<sup>81</sup> See Davis, *supra* note 1, at 7.

writer or a replacement for the legal writer.<sup>82</sup> To ensure that novice legal writers are not replaced by generative AI, law faculty must instruct their students to be the human in the loop that adds value to any generative AI product.

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<sup>82</sup> See ABA Comm. on Ethics & Prof. Resp., *supra* note 25, at 4 (opining that generative AI tools “cannot replace the judgment and experience necessary for lawyers to competently advise clients about their legal matters or to craft the legal documents or arguments required to carry out representations”).