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### ARTIFICIAL INTELLIGENCE IS TAKING OVER THE ART OF BRIEF WRITING

I am a retired lawyer on inactive status. When I was practicing, I concentrated in appellate advocacy. For a number of years, I also taught law students how to write briefs as an adjunct faculty member for the moot court program at Saint Louis University School of Law. So, it's fair to say that I devoted much of my career to legal brief writing.

I first wrote about the potential impact of artificial intelligence on brief writing five years ago. I broached the topic in what then for me was an existential question. Would artificial intelligence eventually take over what I considered to be the art of legal brief writing? Now with the advent of ChatGPT and other AI tools, it's no longer a question. Artificial Intelligence indeed is writing legal briefs. This article explores some of the profound consequences of this development.

#### My Own Set of "Human" Techniques for Effective Brief Writing

When I was a moot court coach, I encouraged my students to apply what I always considered to be the "human" techniques for effective brief writing. I put these techniques into three broad categories.

1. Grab the Judge's Attention with a Strong Introduction: The legal writing expert, Ross Guberman, identifies four types of introductions that are commonly used by the nation's top lawyers.<sup>1</sup>

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<sup>1</sup> See, R. Guberman, Point Made: How to Write Like the Nation's Top Advocates (Oxford Univ. Press 2011).

First, Guberman suggests a “brass tacks” model where you highlight the who, what, where, why and how of the brief. Second, he suggests that you can present a “short list” of numbered reasons why you should win. Third, Guberman suggests that you try to answer the question, “Why should I care?” Under this model, you try to highlight the potential adverse effects of a ruling for the other side. Finally, he identifies the “Don’t be fooled” model. Under this last approach, you draw a distinction between the parties’ two contrasting views of the motion and explain why the other side’s view is wrong. In his recent book, Guberman provides examples of each of these four models.<sup>2</sup>

2. Structure Your Argument to Answer the Judge’s Questions: I also encourage you to use Ross Guberman’s approach to structuring the argument of your brief. Under the Guberman approach, you match your structure to the judge’s questions, not your authority. Guberman places great emphasis upon the proper use of topic sentences. Make sure that the topic sentence of every paragraph, if true, helps you win. And make sure that the topic sentences, in sequence, create a cogent argument.<sup>3</sup>

3. Keep it Simple: I encourage you to make the arguments in your legal brief simple and easy to read. You should not make the judge’s task more difficult by using convoluted sentences, long paragraphs, abstract sentence subjects, passive verbs, and arcane legal jargon. Follow the trend of modern brief writing by simplifying your memorandum wherever possible.

I suggest a few basic rules: Try to use short and simple sentences. Resist the temptation to string together related concepts with conjunctions and dependant clauses. Keep your paragraphs down to no longer than half the page. If a paragraph is running too long, break it up into manageable parts. And to the extent you can, try to use parties, people or courts as the subject of your sentences, as opposed to abstract legal concepts. You should employ action verbs for the majority of your sentences.

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

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

## The Role of Artificial Intelligence to Assist in the Writing Process

Can artificial intelligence tools be used to assist with these different writing techniques? For many editorial functions, the answer is an emphatic “yes.”

One of the more sophisticated products is Ross Guberman promotes BriefCatch.<sup>TM</sup> This product provides suggestions and feedback to the lawyer in the editing process. In promotional materials, Guberman says his program will suggest edits “based on thousands of algorithms that reflect the best practices in legal writing, direct input from judges, and analysis of the best legal writers’ styles and strategies.”<sup>4</sup> This product will give you grades on different criteria as you work through your brief edits.

## The Role of Artificial Intelligence in Actually Writing the Briefs

The New York Times once asked if artificial intelligence products will eventually replace the role of the human lawyer. The sobering conclusion in the article was: “Not yet.”<sup>5</sup> Jimoh Ovbiagele, the chief technology officer for a start-up called Ross Intelligence, said in the article that his engineers then were in the preliminary process of trying to automate the memo-writing process. Ben Allgrove, a partner at the firm of Baker McKenzie, mused: “Where the technology is going in three to five years is the really interesting question...And the honest answer is we don’t know.”<sup>6</sup> Allgrove asked his provocative question almost seven years ago. The New York Times article was dated March 19, 2017.

In an article published in 2019, Eugene Volokh imagined someone inevitably will design a program that writes briefs. Volokh said that if AI ever passes what he calls the Turing Test – meaning that AIs will be

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<sup>4</sup> See <https://briefcatch.com>.

<sup>5</sup>S. Lohn, “A.I. Is Doing Legal Work. But It Won’t Replace Lawyers, Yet.” N.Y. Times (March 19, 2017). See, <https://nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html>.

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

able to converse like human lawyers do in writing – AI may be able to provide an answer on why a client should prevail on some issue.<sup>7</sup> So, in the end, the ultimate question is whether AI can pass an objective test on the criterion of persuasion.<sup>8</sup>

Volokh understood his objective test could be a monumentally difficult design problem. But if the software could accomplish that, that’s all you would need.<sup>9</sup> It would mean that the software could replace the associate model in producing the first draft of a brief. The role of the more senior lawyer then would be limited to reviewing and editing the brief – at a fraction of the cost of writing it from scratch.<sup>10</sup>

### The Significance of ChatGPT for Brief Writing

Within the past year, Open AI has upgraded its Chatbot, ChatGPT-3.5 to the more advanced GPT-4.<sup>11</sup> This development has profound implications for the ability of artificial intelligence to actually write briefs for lawyers. In a LinkedIn article, Ann P. Levin contends Chat GPT is now coming close to passing what Volokh called the Turing Test.<sup>12</sup> Essentially, Chat GPT programs are “machine-learning programs” that read vast amounts of text and huge portions of the internet. “By analyzing so much human-produced text, they learn the fundamental patterns underlying human language and can produce their own text.”<sup>13</sup> The more advanced GPT-4 is now capable of producing a good first draft of a legal brief.<sup>14</sup> But as Professor Harry Surden warns in a Colorado Lawyer publication, you would not want to file this draft in court without double-checking it for errors and applying additional

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<sup>7</sup> E. Volokh, “Chief Justice Robots,” 68 Duke L.J. 1135, 1144-1145 (2019).

<sup>8</sup> *Id.* at 1145.

<sup>9</sup> *Id.* at 1146.

<sup>10</sup> *Id.* at 1147.

<sup>11</sup> A. Levin, “Artificial Intelligence and Legal Writing,”

<https://www.linkedin.com/pulse/artificial-intelligence-legal-writing-ann-p-levin>.

<sup>12</sup> *Id.*

<sup>13</sup> R. Sandgrund, “Who Can Write a Better Brief: Chat AI or a Recent Law School Graduate?”, Colorado Lawyer (July/August 2023), p. 27.

<sup>14</sup> *Id.* at p. 28.

reasoning and analysis.<sup>15</sup>

Chief Justice John Roberts devoted part of his year-end annual report for 2023 to the effect of AI on the legal profession. Roberts wrote that AI “obviously has great potential to dramatically increase access to key information for lawyers and non-lawyers alike.”<sup>16</sup> And Roberts posited AI could be particularly useful in ensuring broader access to justice. But Roberts warned that “any use of AI requires caution and humility” because of the risk of “invading privacy interests and dehumanizing the law.”<sup>17</sup>

### The Risks of Using ChatGPT and Similar AI Products

The Chief Justice issued his warnings about the use of AI in the wake of notorious situations where AI products generated fictitious content, known as “hallucinations.”<sup>18</sup> For instance, Michael Cohen, Donald Trump’s former lawyer, revealed in court papers that he mistakenly gave his attorney non-existent case citations generated by an AI program called Google Bard. Those fake citations made their way into an official court filing.<sup>19</sup> In another case, a federal judge in New York sanctioned lawyers who submitted a legal brief created by ChatGPT that included citations of non-existent court cases.<sup>20</sup> Closer to home, the Missouri Court of Appeals for the Eastern District recently sanctioned a pro se litigant who used AI to cite fictitious cases.

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<sup>15</sup> *Id.*

<sup>16</sup> A. Howe, “AI Won’t Displace Human Judges, but Will Affect Judiciary, Roberts Says in Annual Report,” <https://www.scotusblog.com/2023/12/ai-wont-displace-human-judges-but-will-affect-judiciary-roberts-says-in-annual-report/>

<sup>17</sup> *Id.*

<sup>18</sup> J. Kruzel, “U.S. Supreme Court’s Roberts Urges ‘Caution’ as AI Reshapes Legal Field,” <https://www.reuters.com/legal/us-supreme-courts-roberts-urges-caution-ai-reshapes-legal-field-2023-12-31/>

<sup>19</sup> *Id.*

<sup>20</sup> J. Russell, “Sanctions Ordered for Lawyers Who Rely on ChatGPT Artificial Intelligence to Prepare Court Brief,” <https://www.courthousenews.com/sanctions-ordered-for-lawyers-who-relied-on-chatgpt-artificial-intelligence-to-prepare-court-brief/>

Because of the risk of hallucinations, Professor Surden cautions it is important to “have humans in the loop” for double-checking and additional analysis.<sup>21</sup> Ann P. Levin suggests, “Chatbot answers may sound confident, but they can be wrong.” Because of this possibility, she cautions that AI “still needs human oversight.”<sup>22</sup>

Beyond hallucinations, experts recognize that the use of ChatGPT raises some thorny ethical issues. Levin considers it “depressing to contemplate machines handling legal ethics and professional responsibility questions.”<sup>23</sup> Surden says lawyers must specifically confront the following ethical issues:

1. Confidential and Privacy: The use of generative AI systems like ChatGPT raises data privacy issues when sensitive information may be processed by the AI systems.
2. Bias and Fairness: AI systems are only as unbiased as the data they are trained on. This means lawyers must monitor their AI systems for potential biases.
3. Accountability: Lawyers must be able to explain how their AI systems work and to take responsibility for mistakes.
4. Professionalism: Lawyers must avoid delegating to their AI systems tasks that require human judgment and skills.
5. Informed Consent: Lawyers must obtain the informed consent of their clients before using AI systems.
6. Unauthorized Practice of Law: Lawyers must make sure their AI systems are not performing tasks that should only be undertaken by licensed attorneys.<sup>24</sup>

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<sup>21</sup> R. Sandgrund, “Who Can Write a Better Brief: Chat AI or a Recent Law School Graduate?”, *Colorado Lawyer* (July/August 2023), pp. 27-28.

<sup>22</sup> A. Levin, “Artificial Intelligence and Legal Writing,” <https://www.linkedin.com/pulse/artificial-intelligence-legal-writing-ann-p-levin>.

<sup>23</sup> *Id.*

<sup>24</sup> R. Sandgrund, “Who Can Write a Better Brief: Chat AI or a Recent Law School Graduate?”, *Colorado Lawyer* (July/August 2023), p. 29.

## Conclusion

The dystopian speculation about AI's role in writing briefs may sound frightening. And the development of ChatGPT-4 means it's really happening. It makes me grateful that I am now retired. For the moment, you should still view most artificial intelligence products as tools to improve the quality of your written briefs. But if you do use the most advanced writing tools, like ChatGPT-4, make sure you exercise proper oversight over the briefs filed. And make sure you are not crossing the ethical lines raised by Professor Surden.

To me, the art of crafting a compelling written argument should be more than a mechanical or quantifiable exercise. Until software designers can accomplish the task of completely substituting AI for lawyers, the human element remains critical to the art of persuasion. The human element still allows us to appreciate the stylistic difference between an opinion written by Elena Kagan from one written by John Roberts.