

Amusing Inventions Not to Be Thrown Away¹: ChatGPT and the Future of Tax

By Carina Federico and Travis Thompson*

Introduction



On March 27, 1907, Samuel Clemens opined on the magnificent benefits of a new invention that he called the “wireless telephone” and the machine’s ability to record messages from the telephone in his house “when no one is present.”² Mr. Clemens marveled at the investment opportunities that such a device would bring and explained why he purchased stock in the company without hesitation after losing out on a similar opportunity with Bell Telephone.³ Of course, the man we most commonly refer to as Mark Twain was not talking about actual wireless telephones. Rather, he was speaking about a device called the telegraphone.⁴

The telegraphone was invented by the Danish telephone technician Valdemar Poulsen in the summer of 1898 and was the world’s first functional magnetic recorder.⁵ It was not a telephone, but rather a device that could be attached to a telephone to record messages, and could also be used for dictation.⁶ Poulsen invented it because he was frustrated by the fact that telephone callers were unable to leave a message if the party they called was not at home.⁷ Despite favorable publicity and considerable investment, Poulsen’s invention was a commercial failure, and he never made a dime from it.⁸ Ironically, within a few years of his death in 1942, Poulsen’s discoveries formed the basis of a major manufacturing enterprise, and magnetic recording became central to the modern entertainment and computer industries of the 20th century.⁹

Not unlike the past publicity and excitement promised by the telegraphone, today, ChatGPT and Generative AI are touted as technologies that will change the world. While some believe this transformative artificial intelligence has far-reaching implications for the future of tax practice and tax research, others are more skeptical. Importantly, while ChatGPT may be able to draft anything from a routine legal document to a complex analysis of a Supreme Court case, tax practitioners have to carefully consider how to use this new technology while still upholding their ethical obligations to clients.

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This article explores the nature of ChatGPT as a technology, its potential impact on the world of tax, and the potential ethical issues promised by its use as a tax practitioner.

What Is Generative AI and ChatGPT?

Generative artificial intelligence (“AI”) refers to deep-learning models that can take raw data—say, all of Wikipedia or the collected works of Rembrandt—and “learn” to generate statistically probable outputs when prompted.¹⁰ At a high level, generative models encode a simplified representation of their training data and draw from it to create a new work that is similar, but not identical, to the original data.¹¹ Generative models have been used for years in statistics to analyze numerical data, but the rise of deep learning has made it possible to extend the models to images, speech, and other complex data types.¹²

ChatGPT is a type of Generative Pre-Trained Transformer (“GPT”) large language model developed by OpenAI and backed by Microsoft.¹³ It is an inexhaustible generator of text and can write with accuracy in English about almost any topic.¹⁴ ChatGPT was released on November 30, 2022 and in less than 1 week the system was deployed by more than 1 million users.¹⁵ The latest model GPT-4 was released on March 14, 2023 on a limited basis to paid subscribers.¹⁶ GPTs are inherently “generative,” meaning that they expand on their initial training by learning from user interactions.¹⁷

Implications for the World of Tax

The capabilities of generative AI have far-reaching implications for tax research and analysis. Four key areas in which AI and machine learning are going to make significant contributions in 2023: predictions, research recommendations, intelligent diagramming, and large language models like ChatGPT.¹⁸ In 2023, and beyond, the increasing power of AI will continue to affect the practice of tax law in new and interesting ways.¹⁹ The use of AI in the tax and legal context will become more widespread.²⁰

For instance, companies like BlueJ have designed predictive case analytics software and intelligent diagramming applications that significantly improve the efficiency of tax practitioners and lawyers. These AI tools give tax practitioners the opportunity to capture more of their billable time, and complete tasks faster with higher rates of reliability—a godsend for any general counsel of a law or accounting firm worried about young lawyers or accountants giving bad advice. BlueJ’s newest product “Ask

Blue J” will leverage ChatGPT and other large language models, and a vast tax database to deliver quality answers to tax questions in seconds.

Ethical Considerations for Tax Practitioners

Generative AI tools, such as ChatGPT, pose both great promise and considerable risk to tax and legal professionals.

Tax professionals may benefit from using generative AI to produce basic business letters and memoranda and to perform simple tasks. For instance, a tax professional could potentially use a generative AI tool to conduct client intake by interacting with potential clients and gathering relevant tax information. AI could also be used to explain the significance of receiving an IRS tax audit letter.

However, when judgment, expertise, and nuance come into play, AI tools like ChatGPT are not quite ready for primetime. For instance, ChatGPT may give a partially incorrect answer with an authoritative-sounding explanation or reasoning behind it. ChatGPT has been known to create cases and other authorities that do not exist. ChatGPT does not give the user citations to the information it finds, so it can be difficult to cite check.

Further, ChatGPT currently is outdated, as it does not have knowledge prior to 2021 and would not be able to give information that became available after that date, including changes in the law. ChatGPT itself agrees that it is not a substitute for tax and legal professionals. When asked “Can a taxpayer rely on ChatGPT for tax advice?” ChatGPT responded:

“As a language model, ChatGPT is not a licensed tax professional and cannot provide specific tax advice. It is trained to provide general information on a wide range of topics, including taxes, but it cannot substitute for the advice of a qualified and licensed tax professional. Tax law and regulations are subject to change and can vary depending on the jurisdiction. Therefore, it is always recommended to consult with a licensed tax professional who has knowledge of the specific laws and regulations in your state or country and who can provide personalized advice based on your individual circumstances.”

Currently, the ABA Model Rules and Circular 230 have not been updated to address the use of generative AI in legal practice. As AI becomes more commonplace, the ABA Model Rules and Circular 230 may be amended

and revised to reflect changes in technology. Regardless, several ABA Model Rules and Circular 230 are applicable as currently drafted when evaluating whether lawyers may use ChatGPT and other generative AI tools in their work.

ABA Model Rules

First, ABA Model Rule 1.1: Competent Representation sets forth that “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The comments to Model Rule 1.1 provide some interesting issues when considering whether and how to use AI tools. First, the comment on legal knowledge and skill provides that lawyers can meet the requirement of competent representation by studying a novel field. Could ChatGPT be used as part of the study requisite to getting up to speed on a new area of law? Perhaps, if it was used to get a foundational understanding of an area of law and the lawyer also used more traditional methods to learn the remaining aspects of that area.

Under the Competent Representation rule, lawyers are also required to inform their clients and obtain assistance from a lawyer outside the firm to assist in the legal services provided to the client. In future versions of the ABA Model Rules, the rules committee may include how lawyers may interact with AI and how those interactions need to be disclosed.

Another key ethical issue is how lawyers can maintain their duty of confidentiality of information. Under ABA Model Rule 1.6, lawyers are not permitted to reveal information relating to the representation of a client without the client’s consent. Currently, the open-source ChatGPT program uses the information entered by a user to continue to build and refine its functionality. If a lawyer enters client data into ChatGPT, that data is no longer confidential. If, however, a law firm were to purchase its own version of ChatGPT and were to use it only internally, lawyers could potentially use the software without the potential for breaching their clients’ confidentiality. However, an internal version of the software will not benefit from constant updates and improvements available on a public version of the software. Future generative AI programs or newer versions of ChatGPT may take these issues into account to develop solutions that will work in industries, such as law, where information must be kept confidential.

Similarly, ABA model Rule 5.1 sets forth the responsibilities of a partner or supervisory lawyer in a law firm, such

that a partner or supervisory lawyer must take reasonable efforts to ensure that lawyers in the firm conform to the Rules of Professional Conduct. This may include ensuring that partners or supervisors know how the research was conducted and work was performed before sending information to clients or filing documents with the court. If a partner asks a junior attorney to draft the first draft of a brief, the partner may be required to inquire how the brief was drafted to make sure that generative AI was not used improperly to do so.

Circular 230

As currently written, Circular 230 imposes strict requirements on tax professionals, which would make it difficult if not impossible to use ChatGPT or other generative AI to conduct client work.

Circular 230, Section 10.22 “Diligence as to accuracy” requires tax practitioners to exercise diligence in preparing or assisting in preparation of approving, and filing tax returns, documents, affidavits, and other papers relating to IRS matters and determining correctness of oral or written representations made to the Treasury Department or the IRS. Section 10.35 further requires that practitioners possess the necessary knowledge, skill, thoroughness, and preparation necessary for the matter. Similar to ABA Model Rule 1.1 described above, tax practitioners will not be able to meet the requirements of Sections 10.22 or 10.35 of Circular 230 if they rely on ChatGPT in its current state to conduct work for them. If relying on the work of others, under Section 10.22, a practitioner must use reasonable care in engaging, supervising, training, and evaluating the person. As with ABA Model Rule 5.1, practitioners should ask the individuals creating first drafts and working on documents filed with the IRS and Treasury what research tools they used and whether they used ChatGPT or other tools to assist them with drafting.

Section 10.37 of Circular 230 requires that a practitioner must base the written advice they give clients on reasonable factual legal assumptions, including assumptions as to future events. ChatGPT is unlikely able to conduct this level of analysis. Practitioners are also required to consider all relevant facts and circumstances that the practitioner knows or reasonably should know, which requires training and experience that generative AI does not currently have. A practitioner may only rely on the advice of another person if the advice was reasonable and in good faith, which would be absent if solely relying on work product generated by ChatGPT.

Lawyers and Judges Beware

Generative AI has tempted many lawyers and judges to use the technology to complete legal work, submit court filings, and to write court opinions. For instance, in Columbia, Judge Manuel Padilla used ChatGPT to decide whether an autistic child's insurance should cover all of the costs of his medical treatment.²¹ Judge Padilla used other case precedent as well, but he asked ChatGPT, "Is an autistic minor exonerated from paying fees for their therapies?"²² ChatGPT's response was, "Yes, this is correct. According to the regulations in Columbia, minors diagnosed with autism are exempt from paying fees for their therapies."²³ Judge Padilla defended the use of the technology, saying it could ultimately make Columbia's legal system more efficient.²⁴

In comparison, Texas District Court Judge Brantley Starr banned legal filings that are drafted primarily by artificial intelligence in his court without first checking the documents for accuracy.²⁵ Judge Starr ordered that attorneys must file a certificate before appearing before the court that either artificial intelligence platforms did not contribute to any part of the filing, or that someone checked the language that it drafted for accuracy.²⁶ Judge Starr argued the platforms were "prone

to hallucinations and bias" and made up case law and citations. Meanwhile, most courts in the United States do not place the same the restrictions on lawyers as Judge Starr has, and a host of lawyers across the country have recently admitted or have been caught citing fake cases produced by ChatGPT.²⁷

The lesson here for lawyers and judges alike is—be careful. If practitioners are going to use ChatGPT and generative AI to help them complete legal work, they should also use traditional print reporters and legal databases to check their work for accuracy. Failing to do so, could bring admonishment, sanctions, or review by their respective state bar associations.

Conclusion

As of now, ChatGPT's potential in the worlds of law and tax seems to give it more commercial viability and investment opportunity than Twain's telegraphone. With drastic increases in efficiency and real-time return on investment ("ROI"), generative AI applications have incredible promise. Nonetheless, tax practitioners should be wary of the ethical issues lurking behind the use of these advanced technologies. Only time will tell the true impact of ChatGPT, but for now, we should enjoy the ride.

ENDNOTES

¹ Title inspired by a quote from Mark Twain's *The American Claimant*, Webster, 1892.

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² www.ucpress.edu/blog/20052/mark-twain-on-technology/.

³ *Id.*

⁴ *Id.*

⁵ Mark Clark and Henry Nielsen, *Crossed Wires and Missing Connections: Valdemar Poulsen, The American Telegraphone Company, and the Failure to Commercialize Magnetic Recording*, 69, 1 BUSINESS HISTORY REV. 1 (Spring, 1995).

⁶ www.ucpress.edu/blog/20052/mark-twain-on-technology/.

⁷ Mark Clark and Henry Nielsen, *Crossed Wires and Missing Connections: Valdemar Poulsen, The American Telegraphone Company, and the Failure to Commercialize Magnetic Recording*, 69, 1 BUSINESS HISTORY REV. 4 (Spring, 1995), citing *Politiken*, 21 October 1899, p. 2.

⁸ *Id.* at pp. 1 and 2.

⁹ *Id.*

¹⁰ research.ibm.com/blog/what-is-generative-ai.

¹¹ *Id.*

¹² *Id.*

¹³ Benjamin Alarie, *The Rise of the Robotic Tax Analyst*, 178, 1 TAX NOTES FEDERAL 57 (January 2, 2023).

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Garrett Brodeur and Liz Grant, ChatGPT: A Piece of the Puzzle, Not a Panacea, Bloomberg Tax, Tax Management Memorandum, 64 10, 5/8/23.

¹⁷ *Id.*

¹⁸ Benjamin Alarie, *The Rise of the Robotic Tax Analyst*, 178, 1 TAX NOTES FEDERAL 60 (January 2, 2023).

¹⁹ *Id.*

²⁰ Abdi Aidid and Benjamin Alarie, *The Legal Singularity: How AI Can Make the Law Radically Better*, University of Toronto Press, 2023.

²¹ www.theguardian.com/technology/2023/feb/03/columbia-judge-chatgpt-ruling.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ thehill.com/policy/technology/4032793-texas-judge-bans-legal-filings-that-rely-on-ai-generated-content/.

²⁶ *Id.*

²⁷ www.cnn.com/2023/05/27/business/chat-gpt-avianca-mata-lawyers/index.html.

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