

ARIZONA ADR FORUM

THE CHAIR'S COLUMN

ALEXIS PHEIFFER

**ALEXIS PHEIFFER**

is an experienced mediator, facilitator, and investigator based in Phoenix, Arizona. She is an AAA Affiliate and MC3 certified mediator, focusing on resolution of employment and personal injury disputes. Alexis' creative and party-focused approach to dispute resolution draws on more than 20 years of employment law and litigation experience, both in private practice and in-house. She has served on the Executive Council for the ADR Section of the State Bar of Arizona since 2020, previously holding the roles of CLE Subcommittee Chair and Section Vice-Chair. Alexis received her Certificate in Dispute Resolution from Pepperdine University's Straus Institute for Dispute Resolution, her J.D. from the University of Minnesota at Law School, and her A.B. in Psychology from Georgetown University. Learn more about Alexis and her approach to dispute resolution at alexispfeiffer.com.

It's hard to believe that it's already mid-February. As I write this, the 2023-24 State Bar year is 2/3 complete and rapidly drawing to a close, and our current Council is planning for the future.

Our Late Winter newsletter is heavy on technology updates, particularly AI. We cannot yet know all the ways artificial intelligence will impact our roles as neutrals and advocates, but one thing is certain – we continue to need human intelligence to lead our Section in the 2024-25 State Bar year and for many years to come.



Our Nominating Committee, led by Section Vice Chair Rick Mahrle, is currently seeking new Executive Council members. The Executive Council is responsible for administration of the ADR section and includes both non-voting Associate Members, who serve a one-year term, and voting At-Large Members, who serve a three-year term on the Council. The term of service for new Council members begins after the State Bar Convention, which this year is from June 12 to 14. At-Large Members are eligible for officer positions after initial service on the Council. Three (3) voting At-Large Member seats are open for 2024-25, and we have openings for non-voting Associate Members as well.

The Council meets monthly for one hour (currently around lunch hour on the third Wednesday of each month) from September to May and currently rotates between hybrid and fully on-line meetings. Council members are expected to attend a majority of our meetings. Committees meet between meetings, and members working on articles, the State Bar Convention, or CLE presentations spend additional time on these projects.

For those of you interested in more involvement but not ready to commit to a Council position, please consider joining one of our committees. We have positions available on our standing committees, including the CLE Committee, the State Bar Convention Program Committee, the Membership Committee, and the Newsletter Committee, and we are always happy to have new input and ideas.

If you are interested in serving on the Council or a Committee, if you have questions regarding Section positions or functions, or if you know any Section members who would be good Council or Committee candidates, please contact me (ap@alexispfeiffer.com) or Rick Mahrle (rmahrle@gblaw.com), directly. Our Nominating Committee will present a slate of candidates at our March 2024 meeting, so if you'd like to be considered, please contact us as soon as possible.



Finally, while we look forward to 2024-25, we still have great programming ahead for 2023-24. Already the Section has provided a number of outstanding educational and networking opportunities such as:

- ▶ An in-person mixer with the In-House and Litigation Sections followed by a panel discussion on ADR In-House;

EDITOR | DENNY ESFORD

We welcome comments about this newsletter and invite you to suggest topics or submit an article for consideration.

Contact the Editor, Denny Esford at denny@windycitytrialgroup.com.

- ▶ Our annual ADR legal update; and
- ▶ An engaging webinar on culture, diversity, equity and inclusion in ADR.

This spring, watch for presentations on mediation psychology and negotiation strategies for neutrals and advocates as well as a joint presentation with the Real Estate and In-House sections. Remember – Section members get a discount on Section CLE registration! We're also hard at work on ADR presentations for the State Bar Convention – more information coming soon!

I hope you will strongly consider getting more involved in our Section. Different ideas, experiences, and backgrounds make us stronger, and we welcome new voices for our Council and Committee roles. We hope to hear from you and to see you at an upcoming Section event.

All the best,

Alexis Pheiffer
Chair – ADR Section

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2024-25 Executive Council Interest: Section Vice Chair **Richard Mahrle**
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EDITOR

Artificial Intelligence (AI) is upon us. Much like the advent of online research giants LEXIS and WESTLAW that replaced Shepard's books on the shelves of law libraries, we can embrace AI now, or perhaps get run over by AI later. So in this issue, Abe Malamed takes us on a head first dive to implement AI in his ADR practice while Robert Coppel provides a primer on lawyer ethics in a digital age. We also hear back from those energetic students at U of A, who not only formed a mediation club but put on its own successful mock mediation tournament during its first year of existence.

EDITOR'S MESSAGE

DENNY ESFORD



Artificial Intelligence

As always, feedback on each issue is welcome—the goal is to inform and keep you abreast of the latest news in ADR. If you have an idea or want to author an article, just drop me an email to start the process.

Denny Esford

Editor – ADR Section Newsletter

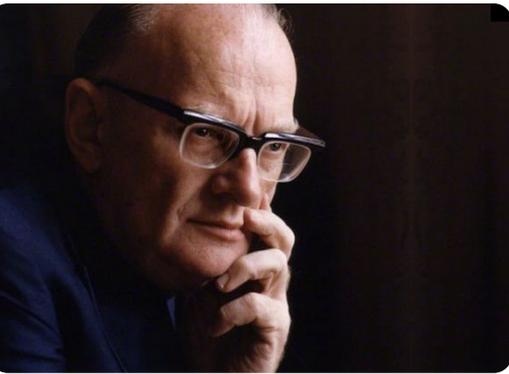
GENERATIVE

Generative Artificial Intelligence (“AI”) in ADR

BY ABE MELAMED

Fiction Becomes Fact

In a 1964 video interview with the BBC, science fiction author Sir Arthur C. Clarke said...



“If by some miracle a prophet could describe the future exactly as it was going to take place, his predictions would sound so absurd, so far-fetched, that everyone would laugh him to scorn.”

Clarke then went on to predict the Internet, 3D printers and Artificial Intelligence. Clarke predicted that “The most intelligent inhabitants of that future world won’t be monkeys or men, they will be machines.” At the time, Clarke’s predictions indeed sounded so absurd that many laughed him to scorn. But today we live in a world that he largely predicted; a world that is changing rapidly due to technological advancements such as the advent of Generative AI.

By now most of us have heard of Generative AI platforms such as ChatGPT and Google’s Bard. But how can we, as lawyers, adopt and implement these and other AI tools in our legal practices? If we fail to do so, we are missing out on an opportunity to create efficiencies with tangible cost-savings. But perhaps more important, will we be left behind, out of touch with this rapidly evolving technological revolution? So, in this article, I will 1) define Generative AI, 2) demonstrate real-life situations where lawyers can leverage AI in their practices, 3) identify some current limitations of AI, and 4) offer some predictions, as Sir Arthur Clarke did, of the future of AI in the legal industry.

What is Generative AI?

I asked ChatGPT, one of the leading Generative AI platforms, “can you write me a short description of Generative AI for an article I am writing for a legal publication?” It responded with, “Generative AI is a cutting-edge technology that harnesses the power of artificial neural networks to create, modify, or generate content autonomously. It operates by learning patterns and structures from vast datasets, enabling it to produce human-like text, images, and even audio. In the legal realm, Generative AI has found applications in document generation, contract analysis, and legal research, streamlining processes and increasing efficiency. However, its use also raises important legal and ethical considerations, such as intellectual property rights, data privacy, and accountability, as these systems can operate with limited human oversight. As Generative AI continues to evolve, it presents both opportunities and challenges for the legal profession, shaping the way legal services are delivered and regulated in the digital age.”

In short, Generative AI is a tool that can allow lawyers to search through, organize, edit, and even create content; be it legal content, marketing content, or anything in



between, using simple prompts. The “machine” uses predictive patterns from large data sets on the Internet to predict what the content should be, and as it is continuously trained, its predictions become more and more accurate. Although the content may not quite be perfect and requires a human touch to review and edit, ultimately it might cut out as much as 90% your workload. And that is just a preview of what is to come.

AI in ADR

I am a mediator. In preparing to hold a mediation, I will present the basic facts, sanitize them for confidentiality, and input them into ChatGPT. I will then ask Chat GPT to predict what questions will be most thought-provoking in each party’s room. ChatGPT will spit out 10 questions. Inevitably, I will have thought of 8 or 9 of Chat GPT’s recommendations. But I am continuously shocked by the 1 or 2 unique and creative questions this “machine” comes up with that I didn’t foresee. I often use those questions successfully in the mediation process.

In another use-case, I recently recorded an episode of my podcast about mediation (Mediator in the Middle). The quality of the audio for my guest came out poorly. I

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fed the audio into Adobe Podcast, which leverages AI to “clean it up.” AI used the few spots of good audio to reproduce the voice of my guest to create a crystal-clear version of the entire audio with his voice. It sounded exactly like my guest, as if he had spoken the words himself.

Similarly, I recently started feeding recordings of entire meetings, often hours long, into an AI assisted editing tool called Descript. It transcribes the audio in a matter of minutes. I then cut sections out of the transcript, which in turn, cuts it from the audio and even from the video. I can also feed those transcripts into ChatGPT, asking it to summarize the meeting—and does so with great precision. Similar tools can be invited as a “guest” to a Zoom conference call where it will operate in the background, transcribe the meeting in real time, and immediately produce a transcript at the end of the call.



ChatGPT

Beyond ADR

Many of us practice mediation and arbitration as a part of our regular litigation practice. Imagine the implications to precisely abstract deposition transcripts, or large swaths of documents produced by in discovery, finding and isolating key facts in seconds, not hours. Record a client intake session and immediately turn it into a draft Complaint, or record witness calls and immediately turn them into affidavits.

If you had a model trained on enough legal data, such as judicial decisions and legal briefs, you could ask an AI to draft an entire brief for you. If you fed an AI tool a sample of a contract you have previously drafted and give it new party information, you could ask it to draft the revised contract in a matter of seconds. And of course, you can use AI to draft blog posts and other marketing material for your firm. All you do is feed AI the general idea in your prompt, and it will do the rest. These are some of the various AI related tools that already exist in the legal field, and they are but the tip of the iceberg of what is to come.

It will still be critical to review briefs or contacts produced by AI for complete accuracy. We have already seen an over reliance on AI get a New York lawyer into judicial hot water when his AI generated brief cited to case law that did not exist. Other limitations include the risk of biased content, and AI current lack of an in-depth understanding of the law and its application to specific facts—an expensive feature to create and implement in Generative AI models. This is especially challenging in those many areas of law that rapidly change and evolve.

AI: Next Gen Legal Tool

What is clear is that AI is here to stay. As the legal profession adapts to AI, the role of lawyers may shift more to oversight and review of AI-created content. Those who refuse to adapt may be left behind.

I asked ChatGPT “Can you predict what the future of the legal industry will look like in 15 years with AI implemented?” ChatGPT responded that AI is likely to bring automated legal research, document automation in transactional work, AI-assisted due diligence in mergers and acquisitions, predictive analytics for the outcomes of cases, AI paralegal assistance, blockchain and smart contracts that cannot be manipulated, and even AI-assisted dispute resolution more evolved than how I am now leveraging AI. But, as ChatGPT also predicted, “while AI will automate many aspects of legal work, the role of human lawyers will remain vital for complex decision-making, ethical guidance, and strategic thinking.” 

Lawyers, Ethics and Cyber Security: *The Technical Duties*

BY ROBERT COPPLE

The legal profession has rarely been an early adopter of new technology. Lawyers did not make the digital transition easily or without internal opposition. Early efforts to put computers in lawyer offices were often met with resistance because, as we all know, “lawyers don’t type.” But now, the profession is very much a part of the digital commons, in part due to client demands and alignment with the client’s digital business models.

The profession eventually gave in. Today it would be virtually impossible to practice law without digital access and tools. At this point, not using the available digital resources can lead to claims of malpractice and ethical violations.

As our digital contact points multiply, so does the threat to our clients’ personal and confidential information, which we are entrusted to protect. The Internet of Things (IOT) is all around us and, in many instances, virtually invisible. Law firms have increasingly become prime targets for hacking and data theft.

Whether you are solo or part of an international firm, just contemplate the amount of personal and confidential information you hold in trust for your present and past clients. This duty to preserve and protect is further exacerbated by state bar rules that require lawyers to retain client files for a period of years after the engagement.

Eventually and ever so incrementally, the ethics regulatory organizations, *i.e.*, state bar associations, state supreme courts and the American Bar Association, have expanded the scope of ethical codes to include duties relating to digital information storage, eDiscovery, digital transmission, data breaches and cyber security. I refer to these expanded duties as:

- 1 The Duty of Technical Competence
- 2 The Duty of Technical Confidentiality
- 3 The Duty of Technical Communication

The Evolution of Lawyers Technical Duties

The debate about the characterization and discovery of “digital documents” began with the 1970 Amendments to Rule 34 of the Federal Rules of Civil Procedure, which added “data compilations” to the list of things that could be discovered and produced. The notes to the amendment clearly anticipated the growth of computer applications. Some commentators maintained that the amendments expanded the definition of “documents” to include digital information, although others argue it created a new category of discoverable evidence. Either way, data is discoverable and subject to the same retention requirements as paper documents.

Those of us litigating scientific or technical cases before the 2005 Amendments, which directly addressed eDiscovery, understood the discoverability of digital information. We regularly requested production of computer files and the proprietary software necessary to access those files, such as geographic information systems (GIS) used in environmental litigation.

Even so, for years many lawyers ignored the characterization of digital records as discoverable documents. To them a document was a stack of papers and they gave little or no thought to digital information, and nor did their clients. I recall my frustration as a new associate trying to explain to senior partners that our clients’ digital files were, indeed, discoverable. “That can’t be right!”

All of this changed with the expansion of digital discovery or eDiscovery in the late 1990’s. Many businesses and lawyers were completely caught off guard when plaintiff counsel requested digital information and defendants were faced with the high costs of reviewing and producing that information. In addition, those early digital discovery attacks also caused law firms and businesses to question the adequacy of their own digital storage practices and the avoidance of spoliation claims. As a result, early eDiscov-



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- ② ABA Opinion 477R establishes a somewhat vague risk-based approach to the protection of client information.
- ③ Given the growing threats to digital information, it can be assumed that lawyers need to employ some basic level of cyber security with more stringent measures when a particular type of data is the focus, including hiring cyber professionals as employees or consultants. There are many cyber security tools available and designing the appropriate level of protection is generally a matter of security layers designed to meet the specific type of information and threat.
- ④ Particularly regarding offsite third-party storage such as cloud computing, the lawyer must examine the vendor's policies, practices and procedures to ensure they are consistent with the lawyer's ethical duties to protect client information. The ethical duty governs. If the cloud service doesn't reach the same level of cyber security that the lawyer is required to employ for client information held in his office, using that service could be a violation.

The Technical Duty of Communication:

Lawyer's Obligations After a Data Breach or Cyber Attack

As opposed to the paper file room of the practice of old, the digital practice creates

many known and unknown potential entry points for a cyber attack. As a result, when a breach does occur, the lawyer has an ethical duty to inform the client.

Model Rule 1.4 requires lawyers to keep clients "reasonably informed" about the status of a matter and to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Model Rules 1.1, 1.6, 5.1 and 5.3, as amended in 2012, address the risks that accompany the benefits of the use of technology by lawyers. When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules.

ABA Opinion 483 October 17, 2018

www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_op_483.pdf

The duties imposed by the codes of ethics are in addition to any additional liability the lawyer may have for the breach including state cyber security laws, malpractice and loss of reputation.

Application of the Technical Duties to New Legal Technologies

But wait. There's more. We are in a period in which digitally based legal analytics are booming. Much of this growth is in what I broadly refer to as Artificial Intelligence (AI) including:

- ▶ Legal Research and Brief Writing
- ▶ Smart Contracts
- ▶ Predictive technologies
- ▶ Case resource management

Despite the many unknowns, AI is going to have a very significant impact on the legal profession. Already, we are seeing briefs written by AI tools such as ChatGPT and court-imposed sanctions on lawyers who fail to check ChatGPT's work. The codes of professional responsibility will have to be interpreted or amended to address the use of these new technologies.

With that, I'll leave you with a question.

If AI results in a better and/or more cost-effective outcome for a client, does the duty of technical competence require the lawyer to use it? 

ADR IN COLLEGE: U OF A'S FIRST ANNUAL AIMT A SUCCESS

The undergraduate Mediation Team at the University of Arizona (U of A) held its 1st Annual Arizona International Mediation Tournament (AIMT) reporting great success. It was an event that truly embodied the spirit of mediation and teamwork. As we reported in our Fall 2023 issue, Rozie Ezgur founded a mediation club at U of A in early 2023 to “educate students (interested in law or otherwise) on the benefits of mediation, not only to resolve litigation conflicts but to use those mediation skills to proactively address and resolve everyday conflict in their own lives and those experienced by family and friends.”



ROSIE EZGUR



GETTING READY

Much like the well-known competitions in mock trial, the Mediation Team decided to host its own mediation tournament, despite being an organization less than a year old.

By the extended registration deadline of November 25th, six teams from three different schools were set to compete: U of A, Grace College (Winona Lake, Indiana), and Berkeley Law. Unfortunately, the week before the tournament, Berkeley Law had to drop out but still left four teams ready to compete.

DAY ONE

A welcoming ceremony was held on Saturday morning December 2, 2023. Tournament Directors welcomed all teams and announced the day's pairings. Confidential facts for both the plaintiff and defendant were passed out in sealed envelopes to each client/advocate pair.

1

DAY TWO

The competition kicked off as a showdown between Grace College and U of A, a battle of experience versus the rookies. Grace College, a seasoned team, had participated in prestigious tournaments worldwide including the INADR International Law School Mediation Tournament at the University of Bologna, Italy. On the other hand, the Arizonans were competing for the first time.

2

Round One was a case which involved the near downing of a child at her local municipal pool. The child's parent and the pool manager both alleged negligence by the other. The case settled when the pool manager agreed to host a fundraiser at the pool to raise money for the child's medical expenses. The lifeguard on duty at the time of incident was placed on probation.

Round Two was an employment discrimination case with unrealistic party expectations. A feisty and fiery client alleged he had been wrongfully terminated



for going to a protest. The twist: his boss sent him to the protest to gather dirt on the protesters of the company. The client felt nothing lower than \$2.6 million was fair. The company side was flabbergasted. It settled for an astounding \$800K, probably the largest employment discrimination settlement in mock mediation history.

DAY THREE

Round Three involved the President of a Homeowners Association trying to evict a hoarder whose stuff was scattered across their yard. Another fundraiser settlement arose in this round where the Association paid for a shed to be constructed on the hoarder's property and for a storage unit for a year if the shed did not suffice. The hoarder agreed to move everything off his lawn and away from the public eye.

3

Round Four, the final round, was a custody battle between a University of Arizona student and their parent. The student and their child were living in the dorms, a violation of university policy. The case settled when the parent agreed to move to Tucson to provide housing for their child and grandchild.

ADR IN COLLEGE: U OF A'S FIRST ANNUAL AIMT A SUCCESS

Of note, all four fictional rounds were cases were written by AIMT co-directors Brady Lary, a sophomore, and Anelise Cunning, a senior.

CLOSING CEREMONIES

While still mediation, the competitive teaching model is a motivating factor for teams to spend countless hours of preparation. Burgers and fries from In-N-Out and trophies paid by the efforts of Fundraising Chair Taylor Philpott brought AIMT to a close. The University of Arizona teams placed first and third, and Grace College was second.

SPECIAL THANKS

In addition to all the dedicated work for the U of A Mediation Team, this tournament would simply not have been possible without the overwhelming support from Arizona's legal community. Lawyers and other mediators volunteered their time, and the camaraderie and altruism contributed to the overall success of the tournament. Special thanks to the Center for Mediation and Facilitation in Tucson for providing advertising for the



The Center
for Community Mediation
and Facilitation



PROF. JOE
BERRIMAN

AIMT and to the Mediation Team's new coach, Professor Joe Berriman. He teaches negotiation and mediation practices to professionals around the country, including as a Professor of Practice at University of Arizona James E. Rogers College of Law, FBI's Crisis Negotiation Course, Arizona Attorney General's Office Civil Rights Division, Arizona Superior Court, and Association of Family and Conciliation Courts. 

EDITOR'S NOTE:

The 1st Annual Arizona International Mediation Tournament was not just a successful competition; it was a testament to the resilience, adaptability, and collaborative spirit of the mediation community in Arizona.

To learn more, go to www.arizonmediation.org.

