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Friend or Foe? Lexis Artificial Intelligence (AI) in Legal Writing

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FRIEND OR FOE?
LEXIS ARTIFICIAL INTELLIGENCE (AI) IN LEGAL WRITING

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Artificial Intelligence (AI) programs in the law are becoming more popular, moving from downloadable forms,[2] to generating and critiquing contracts and handbooks, and even generating text.[3] Lexis has two major research products that appeal especially to first-year students. The first product is Brief Analysis, which analyzes documents and provides suggestions for additional research.[4] Brief Analysis is more appropriately used to expand research for briefs, motions, and other types of persuasive writing,[5] but could be used to review research and citations for objective memos. The second

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[2] *See, e.g.*, LegalZoom, https://www.legalzoom.com/forms (last visited Jan. 27, 2023); Rocket Lawyer, https://www.rocketlawyer.com/ (last visited Jan. 27, 2023); US Legal Forms, https://www.uslegalforms.com (last visited Jan. 27, 2023).

[3] In November of 2022, the Company OpenAI released an app called ChatGPT that is capable of generating text based on prompts. The app learns from repeated input and can perform functions as diverse as creating plays and short stories and answering standard college essay questions. Although the app has performed poorly in answering some law school essay questions and writing memos, there is no doubt that products of this type will play a role in the future in composing legal documents and perhaps even judicial opinions. *See* Jenna Greene, *Will ChatGPT make lawyers obsolete? (Hint: be afraid)*, Reuters (Dec. 9, 2022), https://www.reuters.com/legal/transactional/will-chatgpt-make-lawyers-obsolete-hint-be-afraid-2022-12-09/.

[4] Westlaw has a comparable product called "Quick Check." *See Quick Check: Intelligent Brief Analysis*, Thompson-Reuter, https://legal.thomsonreuters.com/en/products/westlaw-edge/quick-check.

[5] The critique of the brief has the potential of being set up for a particular party or as a particular motion.

product is a downloadable add-on that enables research to be done side-by-side with the writing of a document.[6] Although the product has many helpful functions, including formatting options, first-year students would likely be most enthusiastic about the function that checks the cite format of the document written.

Both Lexis products are useful research tools as well as beneficial in checking the accuracy of citations. However, as is true of most programs that help legal writers and researchers by invoking particular algorithms, its output is only as good as its input. Moreover, even though the products can verify the pagination for cases cited, the program does not automatically correct citations and put them into appropriate citation format.[7] Whether for research purposes or cite-checking purposes, the output could be misleading for first-year students who rely literally on the information presented.

1. Brief Analysis

The best way to examine the utility of the Lexis AI programs is through looking specifically at a piece of legal writing. For purposes of this essay, the writing being used is a first-year memo that addressed tavern owner liability in Ohio. The facts involved a group of students who were celebrating. The night ended with one of the students crashing her car into the business across the street from the bar. In Ohio, tavern owners may be held liable for harm caused by intoxicated patrons when it is demonstrated that a bartender knowingly served a "visibly intoxicated" patron. The

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[6] *See Lexis for Microsoft Office*, LexisNexis, https://www.lexisnexis.com/en-us/products/lexis-for-microsoft-office.page.

[7] The default citation setting for both products is the *Bluebook*. The Lexis add-in has a few states that may be selected for the default setting, but the *ALWD Citation Manual* is currently not an option for either product (although the *Bluebook* setting would produce citations almost identical to the *ALWD Citation Manual*).

governing statute is Ohio Revised Code § 4399.18, and the main governing case is *Gressman v. McClain*, 533 N.E.2d 732 (Ohio 1988).

After uploading the memo into the Brief Analysis program, the user is sent to the Dashboard, which is divided into six categories:

- Procedural Information (reviews criteria related to a motion, if a motion has been uploaded)
- Recommendations (provides recommended cases/statutes to include)
- Similar Briefs (provides access to other briefs written about a similar issue)
- Jurisdiction (enables access to law of other jurisdictions that may have similar statutes)
- Cited in Your Document (provides Shepard's analysis of the authority cited)
- Quote Check (analyzes quotations for accuracy).

The Dashboard also presents "Extracted Concepts," or keywords that may be used in doing research on this issue. Of these, the Recommendations, Cited in Your Document, and Quote Check features are most likely to attract novice users.

a. Recommendations

The feature that first-year students would most likely be interested in is the "Recommendations" tab. When a student accesses the recommendations, the material in the student's memo is highlighted, with key words being flagged. After highlighting key words, Lexis recommends cases and/or secondary sources that are linked by clicking the tab at the bottom of the passage.

Ohio Revised Code § 4399.18 establishes the rule of law in Ohio for a liquor permit holder's liability when serving an intoxicated patron. Ohio Rev. Code Ann. § 4399.18 (West 2016). The permit holder or his employee may be held liable for damages off the premises caused by negligent actions of a patron, "[i]f the permit holder knowingly sold an intoxicating beverage to [a] noticeably intoxicated person...and the person's intoxication proximately caused... [the damages]." Id. Both factors must be shown by a preponderance of evidence. Id.Ohio case law has determined that being "noticeably or visibly" intoxicated is subjective and not simply defined by a set number of drinks consumed in a certain period of time. Piras v. Screamin Willie's, 27 N.E.3d 973, 978 (Ohio Ct. App. 2015). "Noticeably intoxicated" is not limited to a specific blood alcohol level or a patron acting out of the ordinary. Gressman v. McClain, 533 N.E.2d 732, 735 (Ohio 1988).However, if a bar owner has actual knowledge of a patron's intoxication, other witnesses support that the patron is noticeably intoxicated, and the patron's unusual behavior indicates intoxication, the court may conclude that the bar assumed the risk in continuing to provide the patron with alcohol. Id.; see alsoKulin v. Van Hart, Inc., No. 07 CA 850, 2008 WL 44165222, at *3 (Ohio Ct. App. Sept. 25, 2008). Nonetheless, this has proved to be a difficult standard to achieve in Ohio.533 N.E.2d at 736.

| 10 Cases | 4 Treatises |

With respect to the test case on Ohio tavern owner liability, the unfortunate aspect of the program is that, when the tab for the suggested cases is accessed, none of the cases suggested are cases cited within the memo. This could be misleading for the novice legal researcher who might be concerned that the research was done incorrectly. However, in this particular memo, the cases cited within the memo are more on point than the ten cases Lexis suggested. These recommended cases deal more generally with tavern owner liability in Ohio and include numerous insurance cases that have only a tangential relationship to the fact pattern. Thus, in this instance, the memo writer's research was more accurate than the recommendations of the AI program.

The student researcher might also be misled if the memo omits the governing law or has missed the main case on the issue. The Lexis program will not correct a student's work or analyze any facts to determine whether the student chose the correct statute or even the correct jurisdiction. The program takes the student's material presented at face value. If the excerpted passage above is analyzed in Brief Analysis without citations to either the governing statute or supporting cases, the program neither provides the statute, nor suggests that the researcher missed *Gressman* as the main case on point.
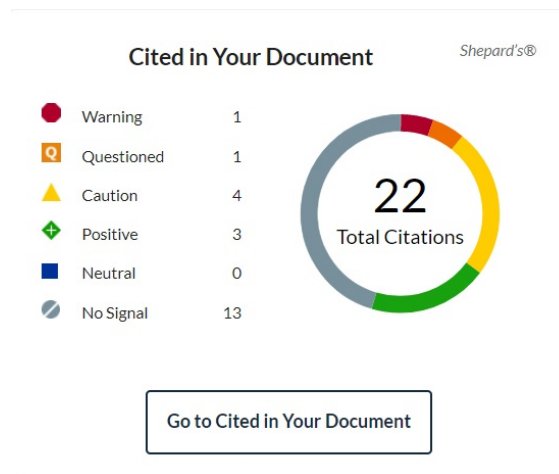
Thus, when using Brief Analysis for research recommendations, the first-year student must use caution. Brief Analysis does not provide the "right" answer or necessarily inform the researcher what important cases might have been missed. Depending on how law is phrased in the memo or what descriptions are included, Brief Analysis will make its best guess as to suggestions for additional authority. Brief Analysis also does not inform the researcher if the law is wrong or incomplete.

b. Cited in Your Document (Shepard's Analysis)

The next Dashboard item that students might be interested in would be the Shepard's Analysis. Shepard's Analysis provides a quick picture as to whether the law cited in the student's memo is still good law. It also provides references to other Secondary Sources on related topics.[8] Shepard's Analysis does not Shepardize any unreported Westlaw cases that are cited in the memo. These cases would have to be researched on Lexis to obtain the Lexis citation so that the Lexis citation could be Shepardized.

The initial visual of the Shepard's Analysis is extremely appealing and alerts the researcher immediately as to whether there are any sources cited that might be problematic.

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[8] Shepard's Analysis provides a citation to Comments, *Dramshop Liability: Should the Intoxicated Person Recover for His own Injuries?* 48 Ohio State L.J. 227 (1987). Although the article is not directly on point with the fact pattern, the article presents collected research on Ohio's law concerning tavern owner liability under the statute.

Cited in Your Document   *Shepard's®*

● Warning	1
Q Questioned	1
▲ Caution	4
✚ Positive	3
■ Neutral	0
◙ No Signal	13

22
Total Citations

Go to Cited in Your Document

However, similar to the other functions of Brief Analysis, the Shepard's information could be misleading. At first glance, it appears that the writer may have cited law that is no longer valid as well as cases that have been called into doubt by other courts. In fact, when the writer accesses the Shepard's material, the first thing that the writer will see is that it is the statute itself that has been flagged with a warning.

Although this might be disconcerting for the student researcher, further investigation reveals that there is pending legislation in Ohio for the entire Code segment covering liquor laws in Ohio. Tavern owner liability is not specifically mentioned, nor is there any change to the statute being relied upon. All pending changes relate only indirectly to what the student researched for the memo. Moreover, none of the proposed changes to the Code have been enacted.[9] Similarly, the memo's cases that have either been questioned or appear with a "caution" are still appropriate to use because the basis for the "negative" treatment is not directly relevant to the subject matter of the memo.

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[9] When the statute is accessed on Westlaw, there is no pending legislation noted, nor is there any pending legislation noted on the official online cite for the State of Ohio. *See* Ohio Laws and Administrative Rules, https://codes.ohio.gov/ohio-revised-code/section-4399.18 (last visited Jan. 27, 2023).

Thus, the novice researcher must also use caution and critical thinking with this aspect of Brief Analysis. The information presented cannot be taken at face value or in any literal sense but must be examined in order to determine whether any authority used should be removed from the memo, or retained as appropriate.

c. Quote Check

The final Dashboard item in Brief Analysis that might be relevant to first-year students is Quote Check. For our test case, Quote Check flagged three quotations in the memo as incorrect. One of the three quotations was not part of the discussion section and apparently confused the AI program. Similarly, the second quotation flagged as incorrect was the modified part of the statute that included ellipses and brackets. Although the wording is not the exact quote from the statute, the modification is properly done pursuant to national citation conventions.

The program does provide useful information for the third quotation flagged as incorrect:

⊘   This quote is Incorrect

① The pinpoint page in your citation is Incorrect

Quote from your brief:

...permit holder or his employee may be held liable for damages off the premises caused by negligent actions of a patron, ?[i]f the permit holder knowingly sold an intoxicating beverage to [a] noticeably intoxicated person?and the person?s intoxication proximately caused... [the damages].? Id. Both factors must be shown by a preponderance of evidence. Id. Ohio case law has determined that being ?   "noticeably or visibly"   ...oticeably or visibly? intoxicated is subjective and not simply defined by a set number of drinks consumed in a certain period of time. Piras v. Screamin Willie?s, 27 N.E.3d 973, 978 (Ohio Ct. App. 2015). ?Noticeably intoxicated? is not limited to a specific blood alcohol level or a patron acting out of the ordinary. Gressman v. McClain, 533 N.E.2d 732, 735 (Ohio 1988). However, if a bar owner

Quote from source citation:

"noticeably [or visibly]"

Source Citation: Piras v. Screamin Willie's, 27 N.E.3d 973, 978 (Ohio Ct. App. 2015)

The program notes that the quotation itself is incorrect, as is the pincite for the quote, but both notes are confusing. Although the program accurately points out the quotation is incorrect (the case cited does not include the word "visibly" in the quote provided), the explanation is confusing. The program does not indicate specifically that the second part of the quotation is not in the case being cited but suggests that there are brackets in the original quote. The program also states that the pincite is incorrect, but then includes a citation that is the same as the cite included in the memo. The program does not tell the researcher that the pincite is incorrect because the quote is not in the case. Thus, the information given is only helpful if the researcher goes to the original case to determine why the quotation and pincite have been flagged as incorrect.

The other issue with the Quotation Check is that it will not flag what *should* have been in quotation marks. Thus, if a student includes the exact wording of the statute in a memo without quotation marks, the program will conclude that there is no mistake because no text was quoted. This is also true of exact wording from cases.

Thus, like the other functions of Brief Analysis, the Quote Check function conclusions require more than accepting verbatim the information provided. The tool is useful only to the extent that the student uses it for something more than merely cite checking or proofreading.

2. LexisNexis Add-In (Word Version)

The second Lexis product beneficial to students is the LexisNexis add-in or extension for Word. The add-in allows the student to access Lexis while composing a document, allowing the student to cut and paste directly from cases, Shepardize in real time, add hyperlinks, and access template documents. There are also advanced features, such as creating an appendix or a table of contents.

The add-in may be acquired by accessing the "Get Add-in" icon from the Inset Tab in the Word Toolbar. The icon takes the user to the Word "app" store where all the available add-ins are listed. An active subscription to Lexis is necessary for the add-in to work.

For first-year students, the functions that might have the most utility are the "Check Cite Format," as well as "Check Quotes." The add-in allows the student to set the Citation Format as "Bluebook" and offers various citation formats from select individual states.[10] While selecting "ALWD" citation format is not an option, the results with the "Bluebook" option should be virtually the same.

Similar to Brief Analysis, the Lexis Cite Checking function must be used with a degree of caution. Examining the same memo as Brief Analysis, the Cite Check has yielded the following information for the initial citations in the memo:

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[10] The current states are California, New York, Florida, Texas, Illinois, Washington, New Jersey, Pennsylvania, and Washington.

The information provided may be useful for those familiar with the *Bluebook* but provides extraneous information that may be confusing to the novice *Bluebook* user. One thing not evident on the results page is that the program is not able to identify underlined text as correct and thus may make inappropriate suggestions to correct the citations, or even make suggestions to correct citations that were already correct in the document. In the final citation in the picture above, the program suggests a change to the citation that makes the citation incorrect pursuant to what is required by the *Bluebook*. The add-in includes a universal "Correct All" button. This choice might be tempting for a first-year student to use, but it could lead to disastrous results.

The second function that might have the most utility for first-year students is the "Check Quotes" function:
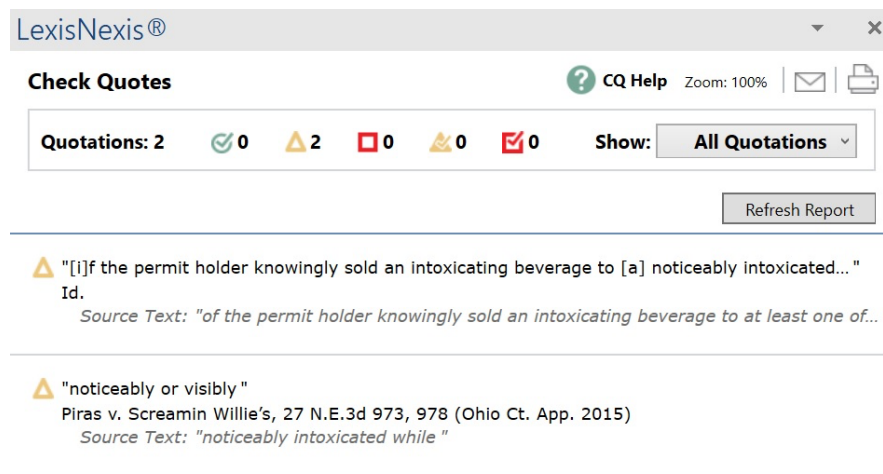
As opposed to Brief Analysis, the Lexis Check Quotes function flags only two quotes in the document as necessitating review. Like Brief Analysis, the first quote flagged by the Lexis add-in is the modified statute quoted in the student memo. Like Brief Analysis, the program does not seem able to recognize whether a modified quote is accurate even if it comports with *Bluebook* Rule 5.2.

The second quotation flagged by the Lexis add-in is identical to the second quote flagged by Brief Analysis. Both programs have highlighted that the quotation being used in the memo is inaccurate and that the language quoted in the memo was not the language used in the case.

Conclusion

Both Brief Analysis and the Lexis add-in provide for useful tools for student legal researchers and attorneys. However, both require a higher degree of knowledge about research and citation than is generally present in novice legal researchers and writers. Although first-year students introduced to these tools may believe them to be a shortcut to improve both research and citation accuracy, the tools are not sophisticated enough to replace the human element. AI has many uses in the law and does make some aspects of document preparation more streamlined, but all AI products must be used with caution and as a supplement to, not a replacement for, in-depth researching and proofreading.