"Use (and Abuse) of Artificial Intelligence in the Practice of Law."

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Materials Packet

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STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

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Generative Artificial Intelligence Tools

To ensure clients are protected, lawyers using generative artificial intelligence tools must fully consider their applicable ethical obligations, including their duties to provide competent legal representation, to protect client information, to communicate with clients, to supervise their employees and agents, to advance only meritorious claims and contentions, to ensure candor toward the tribunal, and to charge reasonable fees.

I. Introduction

Many lawyers use artificial intelligence (AI) based technologies in their practices to improve the efficiency and quality of legal services to clients.[1] A well-known use is electronic discovery in litigation, in which lawyers use technology-assisted review to categorize vast quantities of documents as responsive or non-responsive and to segregate privileged documents. Another common use is contract analytics, which lawyers use to conduct due diligence in connection with mergers and acquisitions and large corporate transactions. In the realm of analytics, AI also can help lawyers predict how judges might rule on a legal question based on data about the judge's rulings; discover the summary judgment grant rate for every federal district judge; or evaluate how parties and lawyers may behave in current litigation based on their past conduct in similar litigation. And for basic legal research, AI may enhance lawyers' search results.

This opinion discusses a subset of AI technology that has more recently drawn the attention of the legal profession and the world at large – generative AI (GAI), which can create various types of new content, including text, images, audio, video, and software code in response to a user's prompts and questions.[2] GAI tools that produce new text are prediction tools that generate a statistically probable output when prompted. To accomplish this, these tools analyze large amounts of digital text culled from the internet or proprietary data sources. Some GAI tools are described as "self-learning," meaning they will learn from themselves as they cull more data. 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.

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[1] There is no single definition of artificial intelligence. At its essence, AI involves computer technology, software, and systems that perform tasks traditionally requiring human intelligence. The ability of a computer or computer-controlled robot to perform tasks commonly associated with intelligent beings is one definition. The term is frequently applied to the project of developing systems that appear to employ or replicate intellectual processes characteristic of humans, such as the ability to reason, discover meaning, generalize, or learn from past experience. BRITTANICA, https://www.britannica.com/technology/artificial-intelligence (last visited July 12, 2024).

[2] George Lawton, *What is Generative AI? Everything You Need to Know*, TECHTARGET (July 12, 2024), https://www.techtarget.com/searchenterpriseai/definition/generative-AI.

GAI tools—whether general purpose or designed specifically for the practice of law—raise important questions under the ABA Model Rules of Professional Conduct.[3] What level of competency should lawyers acquire regarding a GAI tool? How can lawyers satisfy their duty of confidentiality when using a GAI tool that requires input of information relating to a representation? When must lawyers disclose their use of a GAI tool to clients? What level of review of a GAI tool's process or output is necessary? What constitutes a reasonable fee or expense when lawyers use a GAI tool to provide legal services to clients?

At the same time, as with many new technologies, GAI tools are a moving target—indeed, a *rapidly* moving target—in the sense that their precise features and utility to law practice are quickly changing and will continue to change in ways that may be difficult or impossible to anticipate. This Opinion identifies some ethical issues involving the use of GAI tools and offers general guidance for lawyers attempting to navigate this emerging landscape.[4] It is anticipated that this Committee and state and local bar association ethics committees will likely offer updated guidance on professional conduct issues relevant to specific GAI tools as they develop.

II. Discussion

A. Competence

Model Rule 1.1 obligates lawyers to provide competent representation to clients.[5] This duty requires lawyers to exercise the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation," as well as to understand "the benefits and risks associated" with the technologies used to deliver legal services to clients.[6] Lawyers may ordinarily achieve the requisite level of competency by engaging in self-study, associating with another competent lawyer, or consulting with an individual who has sufficient expertise in the relevant field.[7]

To competently use a GAI tool in a client representation, lawyers need not become GAI experts. Rather, lawyers must have a reasonable understanding of the capabilities and limitations

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[3] Many of the professional responsibility concerns that arise with GAI tools are similar to the issues that exist with other AI tools and should be considered by lawyers using such technology.

[4] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2023. The Opinion addresses several imminent ethics issues associated with the use of GAI, but additional issues may surface, including those found in Model Rule 7.1 ("Communications Concerning a Lawyer's Services"), Model Rule 1.7 ("Conflict of Interest: Current Clients"), and Model Rule 1.9 ("Duties to Former Clients"). *See, e.g.*, Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, at 7 (2024) (discussing the use of GAI chatbots under Florida Rule 4-7.13, which prohibits misleading content and unduly manipulative or intrusive advertisements); Pa. State Bar Ass'n Comm. on Legal Ethics & Prof'l Resp. & Philadelphia Bar Ass'n Prof'l Guidance Comm. Joint Formal Op. 2024-200 [hereinafter Pa. & Philadelphia Joint Formal Opinion 2024-200], at 10 (2024) ("Because the large language models used in generative AI continue to develop, some without safeguards similar to those already in use in law offices, such as ethical walls, they may run afoul of Rules 1.7 and 1.9 by using the information developed from one representation to inform another."). Accordingly, lawyers should consider all rules before using GAI tools.

[5] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2023) [hereinafter MODEL RULES].

[6] MODEL RULES R. 1.1 & cmt. [8]. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R, at 2–3 (2017) [hereinafter ABA Formal Op. 477R] (discussing the ABA's "technology amendments" made to the Model Rules in 2012).

[7] MODEL RULES R. 1.1 cmts. [1], [2] & [4]; Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *2–3 (2015).

of the specific GAI technology that the lawyer might use. This means that lawyers should either acquire a reasonable understanding of the benefits and risks of the GAI tools that they employ in their practices or draw on the expertise of others who can provide guidance about the relevant GAI tool's capabilities and limitations.[8] This is not a static undertaking. Given the fast-paced evolution of GAI tools, technological competence presupposes that lawyers remain vigilant about the tools' benefits and risks.[9] Although there is no single right way to keep up with GAI developments, lawyers should consider reading about GAI tools targeted at the legal profession, attending relevant continuing legal education programs, and, as noted above, consulting others who are proficient in GAI technology.[10]

With the ability to quickly create new, seemingly human-crafted content in response to user prompts, GAI tools offer lawyers the potential to increase the efficiency and quality of their legal services to clients. Lawyers must recognize inherent risks, however.[11] One example is the risk of producing inaccurate output, which can occur in several ways. The large language models underlying GAI tools use complex algorithms to create fluent text, yet GAI tools are only as good as their data and related infrastructure. If the quality, breadth, and sources of the underlying data on which a GAI tool is trained are limited or outdated or reflect biased content, the tool might produce unreliable, incomplete, or discriminatory results. In addition, the GAI tools lack the ability to understand the meaning of the text they generate or evaluate its context.[12] Thus, they may combine otherwise accurate information in unexpected ways to yield false or inaccurate results.[13] Some GAI tools are also prone to "hallucinations," providing ostensibly plausible responses that have no basis in fact or reality.[14]

Because GAI tools are subject to mistakes, lawyers' uncritical reliance on content created by a GAI tool can result in inaccurate legal advice to clients or misleading representations to courts and third parties. Therefore, a lawyer's reliance on, or submission of, a GAI tool's output—without

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[8] Pa. Bar Ass'n, Comm. on Legal Ethics & Prof'l Resp. Op. 2020-300, 2020 WL 2544268, at *2–3 (2020). *See also* Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2023-208, 2023 WL 4035467, at *2 (2023) adopting a "reasonable efforts standard" and "fact-specific approach" to a lawyer's duty of technology competence, citing ABA Formal Opinion 477R, at 4).

[9] *See* New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749 (2017) (emphasizing that "[l]awyers must be responsive to technological developments as they become integrated into the practice of law"); Cal. St. Bar, Comm. Prof'l Resp. Op. 2015-193, 2015 WL 4152025, at *1 (2015) (discussing the level of competence required for lawyers to handle e-discovery issues in litigation).

[10] MODEL RULES R. 1.1 cmt. [8]; *see* Melinda J. Bentley, *The Ethical Implications of Technology in Your Law Practice: Understanding the Rules of Professional Conduct Can Prevent Potential Problems*, 76 J. MO. BAR 1 (2020) (identifying ways for lawyers to acquire technology competence skills).

[11] As further detailed in this opinion, lawyers' use of GAI raises confidentiality concerns under Model Rule 1.6 due to the risk of disclosure of, or unauthorized access to, client information. GAI also poses complex issues relating to ownership and potential infringement of intellectual property rights and even potential data security threats.

[12] *See,* W. Bradley Wendel, *The Promise and Limitations of AI in the Practice of Law,* 72 OKLA. L. REV. 21, 26 (2019) (discussing the limitations of AI based on an essential function of lawyers, making normative judgments that are impossible for AI).

[13] *See, e.g.*, Karen Weise & Cade Metz, *When A.I. Chatbots Hallucinate*, N.Y. TIMES (May 1, 2023).

[14] Ivan Moreno, *AI Practices Law 'At the Speed of Machines.' Is it Worth It?*, LAW360 (June 7, 2023); *See* Varun Magesh, Faiz Surani, Matthew Dahl, Mirac Suzgun, Christopher D. Manning, & Daniel E. Ho, *Hallucination Free? Assessing the Reliability of Leading AI Legal Research Tools*, STANFORD UNIVERSITY (June 26, 2024), *available at* https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf (study finding leading legal research companies' GAI systems "hallucinate between 17% and 33% of the time").

an appropriate degree of independent verification or review of its output—could violate the duty to provide competent representation as required by Model Rule 1.1.[15] While GAI tools may be able to significantly assist lawyers in serving clients, they 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.

The appropriate amount of independent verification or review required to satisfy Rule 1.1 will necessarily depend on the GAI tool and the specific task that it performs as part of the lawyer's representation of a client. For example, if a lawyer relies on a GAI tool to review and summarize numerous, lengthy contracts, the lawyer would not necessarily have to manually review the entire set of documents to verify the results if the lawyer had previously tested the accuracy of the tool on a smaller subset of documents by manually reviewing those documents, comparing then to the summaries produced by the tool, and finding the summaries accurate. Moreover, a lawyer's use of a GAI tool designed specifically for the practice of law or to perform a discrete legal task, such as generating ideas, may require less independent verification or review, particularly where a lawyer's prior experience with the GAI tool provides a reasonable basis for relying on its results.

While GAI may be used as a springboard or foundation for legal work—for example, by generating an analysis on which a lawyer bases legal advice, or by generating a draft from which a lawyer produces a legal document—lawyers may not abdicate their responsibilities by relying solely on a GAI tool to perform tasks that call for the exercise of professional judgment. For example, lawyers may not leave it to GAI tools alone to offer legal advice to clients, negotiate clients' claims, or perform other functions that require a lawyer's personal judgment or participation.[16] Competent representation presupposes that lawyers will exercise the requisite level of skill and judgment regarding all legal work. In short, regardless of the level of review the lawyer selects, the lawyer is fully responsible for the work on behalf of the client.

Emerging technologies may provide an output that is of distinctively higher quality than current GAI tools produce, or may enable lawyers to perform work markedly faster and more economically, eventually becoming ubiquitous in legal practice and establishing conventional expectations regarding lawyers' duty of competence.[17] Over time, other new technologies have become integrated into conventional legal practice in this manner.[18] For example, "a lawyer would have difficulty providing competent legal services in today's environment without knowing how

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[15] *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451, at 1 (2008) [hereinafter ABA Formal Op. 08-451] (concluding that "[a] lawyer may outsource legal or nonlegal support services provided the lawyer remains ultimately responsible for rendering competent legal services to the client under Model Rule 1.1").

[16] *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.

[17] *See, e.g.*, Sharon Bradley, *Rule 1.1 Duty of Competency and Internet Research: Benefits and Risks Associated with Relevant Technology* at 7 (2019), *available at* https://ssrn.com/abstract=3485055 ("View Model Rule 1.1 as elastic. It is expanding as legal technology solutions expand. The ever-changing shape of this rule makes clear that a lawyer cannot simply learn technology today and never again update their skills or knowledge.").

[18] *See, e.g.*, Smith v. Lewis, 530 P.2d 589, 595 (Cal. 1975) (stating that a lawyer is expected "to possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by *standard research techniques*") (emphasis added); Hagopian v. Justice Admin. Comm'n, 18 So. 3d 625, 642 (Fla. Dist. Ct. App. 2009) (observing that lawyers have "become expected to use computer-assisted legal research to ensure that their research is complete and up-to-date, but the costs of this service can be significant").

to use email or create an electronic document."[19] Similar claims might be made about other tools such as computerized legal research or internet searches.[20] As GAI tools continue to develop and become more widely available, it is conceivable that lawyers will eventually have to use them to competently complete certain tasks for clients.[21] But even in the absence of an expectation for lawyers to use GAI tools as a matter of course,[22] lawyers should become aware of the GAI tools relevant to their work so that they can make an informed decision, as a matter of professional judgment, whether to avail themselves of these tools or to conduct their work by other means.[23] As previously noted regarding the possibility of outsourcing certain work, "[t]here is no unique blueprint for the provision of competent legal services. Different lawyers may perform the same tasks through different means, all with the necessary 'legal knowledge, skill, thoroughness and preparation.'"[24] Ultimately, any informed decision about whether to employ a GAI tool must consider the client's interests and objectives.[25]

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[19] ABA Formal Op. 477R, *supra* note 6, at 3 (quoting ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012)).

[20] *See, e.g.*, Bradley, *supra* note 17, at 3 ("Today no competent lawyer would rely solely upon a typewriter to draft a contract, brief, or memo. Typewriters are no longer part of 'methods and procedures' used by competent lawyers."); Lawrence Duncan MacLachlan, *Gandy Dancers on the Web: How the Internet Has Raised the Bar on Lawyers' Professional Responsibility to Research and Know the Law*, 13 GEO. J. LEGAL ETHICS 607, 608 (2000) ("The lawyer in the twenty-first century who does not effectively use the Internet for legal research may fall short of the minimal standards of professional competence and be potentially liable for malpractice"); Ellie Margolis, *Surfin' Safari—Why Competent Lawyers Should Research on the Web*, 10 YALE J.L. & TECH. 82, 110 (2007) ("While a lawyer's research methods reveal a great deal about the competence of the research, the method of research is ultimately a secondary inquiry, only engaged in when the results of that research process is judged inadequate. A lawyer who provides the court with adequate controlling authority is not going to be judged incompetent whether she found that authority in print, electronically, or by any other means."); Michael Thomas Murphy, *The Search for Clarity in an Attorney's Duty to Google*, 18 LEGAL COMM. & RHETORIC: JALWD 133, 133 (2021) ("This Duty to Google contemplates that certain readily available information on the public Internet about a legal matter is so easily accessible that it must be discovered, collected, and examined by an attorney, or else that attorney is acting unethically, committing malpractice, or both"); Michael Whiteman, *The Impact of the Internet and Other Electronic Sources on an Attorney's Duty of Competence Under the Rules of Professional Conduct*, 11 ALB. L.J. SCI. & TECH. 89, 91 (2000) ("Unless it can be shown that the use of electronic sources in legal research has become a standard technique, then lawyers who fail to use electronic sources will not be deemed unethical or negligent in his or her failure to use such tools.").

[21] *See* MODEL RULES R. 1.1 cmt. [5] (stating that "[c]ompetent handling of a particular matter includes . . . [the] use of methods and procedures meeting the standards of competent practitioners"); New York County Lawyers Ass'n Prof'l Ethics Comm. Op. 749, 2017 WL 11659554, at *3 (2017) (explaining that the duty of competence covers not only substantive knowledge in different areas of the law, but also the manner in which lawyers provide legal services to clients).

[22] The establishment of such an expectation would likely require an increased acceptance of GAI tools across the legal profession, a track record of reliable results from those platforms, the widespread availability of these technologies to lawyers from a cost or financial standpoint, and robust client demand for GAI tools as an efficiency or cost-cutting measure.

[23] Model Rule 1.5's prohibition on unreasonable fees, as well as market forces, may influence lawyers to use new technology in favor of slower or less efficient methods.

[24] ABA Formal Op. 08-451, *supra* note 15, at 2. *See also id.* ("Rule 1.1 does not require that tasks be accomplished in any special way. The rule requires only that the lawyer who is responsible to the client satisfies her obligation to render legal services competently.").

[25] MODEL RULES R. 1.2(a).

B. Confidentiality

A lawyer using GAI must be cognizant of the duty under Model Rule 1.6 to keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent, disclosure is impliedly authorized to carry out the representation, or disclosure is permitted by an exception.[26] Model Rules 1.9(c) and 1.18(b) require lawyers to extend similar protections to former and prospective clients' information. Lawyers also must make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."[27]

Generally, the nature and extent of the risk that information relating to a representation may be revealed depends on the facts. In considering whether information relating to any representation is adequately protected, lawyers must assess the likelihood of disclosure and unauthorized access, the sensitivity of the information,[28] the difficulty of implementing safeguards, and the extent to which safeguards negatively impact the lawyer's ability to represent the client.[29]

Before lawyers input information relating to the representation of a client into a GAI tool, they must evaluate the risks that the information will be disclosed to or accessed by others outside the firm. Lawyers must also evaluate the risk that the information will be disclosed to or accessed by others *inside* the firm who will not adequately protect the information from improper disclosure or use[30] because, for example, they are unaware of the source of the information and that it originated with a client of the firm. Because GAI tools now available differ in their ability to ensure that information relating to the representation is protected from impermissible disclosure and access, this risk analysis will be fact-driven and depend on the client, the matter, the task, and the GAI tool used to perform it.[31]

Self-learning GAI tools into which lawyers input information relating to the representation, by their very nature, raise the risk that information relating to one client's representation may be disclosed improperly,[32] even if the tool is used exclusively by lawyers at the same firm.[33] This can occur when information relating to one client's representation is input into the tool, then later revealed in response to prompts by lawyers working on other matters, who then share that output with other clients, file it with the court, or otherwise disclose it. In other words, the self-learning

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[26] MODEL RULES R. 1.6; MODEL RULES R. 1.6 cmt. [3].
[27] MODEL RULES R. 1.6(c).
[28] ABA Formal Op. 477R, *supra* note 6, at 1 (A lawyer "may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when … the nature of the information requires a higher degree of security.").
[29] MODEL RULES R. 1.6, cmt. [18].
[30] *See* MODEL RULES R. 1.8(b), which prohibits use of information relating to the representation of a client to the disadvantage of the client.
[31] *See* ABA Formal Op. 477R, *supra* note 6, at 4 (rejecting specific security measures to protect information relating to a client's representation and advising lawyers to adopt a fact-specific approach to data security).
[32] *See generally* State Bar of Cal. Standing Comm. on Prof'l Resp. & Conduct, PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW (2024), *available at* https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf; Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4.
[33] *See* Pa. & Philadelphia Joint Formal Opinion 2024-200, *supra* note 4, at 10 (noting risk that information relating to one representation may be used to inform work on another representation).

GAI tool may disclose information relating to the representation to persons outside the firm who are using the same GAI tool. Similarly, it may disclose information relating to the representation to persons in the firm (1) who either are prohibited from access to said information because of an ethical wall or (2) who could inadvertently use the information from one client to help another client, not understanding that the lawyer is revealing client confidences. Accordingly, because many of today's self-learning GAI tools are designed so that their output could lead directly or indirectly to the disclosure of information relating to the representation of a client, a client's informed consent is required prior to inputting information relating to the representation into such a GAI tool.[34]

When consent is required, it must be informed. For the consent to be informed, the client must have the lawyer's best judgment about why the GAI tool is being used, the extent of and specific information about the risk, including particulars about the kinds of client information that will be disclosed, the ways in which others might use the information against the client's interests, and a clear explanation of the GAI tool's benefits to the representation. Part of informed consent requires the lawyer to explain the extent of the risk that later users or beneficiaries of the GAI tool will have access to information relating to the representation. To obtain informed consent when using a GAI tool, merely adding general, boiler-plate provisions to engagement letters purporting to authorize the lawyer to use GAI is not sufficient.[35]

Because of the uncertainty surrounding GAI tools' ability to protect such information and the uncertainty about what happens to information both at input and output, it will be difficult to evaluate the risk that information relating to the representation will either be disclosed to or accessed by others inside the firm to whom it should not be disclosed as well as others outside the firm.[36] As a baseline, all lawyers should read and understand the Terms of Use, privacy policy, and related contractual terms and policies of any GAI tool they use to learn who has access to the information that the lawyer inputs into the tool or consult with a colleague or external expert who has read and analyzed those terms and policies.[37] Lawyers may need to consult with IT professionals or cyber security experts to fully understand these terms and policies as well as the manner in which GAI tools utilize information.

Today, there are uses of self-learning GAI tools in connection with a legal representation when client informed consent is not required because the lawyer will not be inputting information relating to the representation. As an example, if a lawyer is using the tool for idea generation in a manner that does not require inputting information relating to the representation, client informed consent would not be necessary.

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[34] This conclusion is based on the risks and capabilities of GAI tools as of the publication of this opinion. As the technology develops, the risks may change in ways that would alter our conclusion. *See* Fla. State Bar Ass'n, Prof'l Ethics Comm. Op. 24-1, *supra* note 4, at 2; W. Va. Lawyer Disciplinary Bd. Op. 24-01 (2024), *available at* http://www.wvodc.org/pdf/AILEO24-01.pdf.

[35] *See* W. Va. Lawyer Disciplinary Bd. Op. 24-01, *supra* note 34.

[36] Magesh et al. *supra* note 14, at 23 (describing some of the GAI tools available to lawyers as "difficult for lawyers to assess when it is safe to trust them. Official documentation does not clearly illustrate what they can do for lawyers and in which areas lawyers should exercise caution.")

[37] Stephanie Pacheco, *Three Considerations for Attorneys Using Generative AI,* BLOOMBERG LAW ANALYSIS (June 16, 2023, 4:00 pm), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-three-considerations-for-attorneys-using-generative-ai?context=search&index=7.

C. Communication

Where Model Rule 1.6 does not require disclosure and informed consent, the lawyer must separately consider whether other Model Rules, particularly Model Rule 1.4, require disclosing the use of a GAI tool in the representation.

Model Rule 1.4, which addresses lawyers' duty to communicate with their clients, builds on lawyers' legal obligations as fiduciaries, which include "the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive."[38] Of particular relevance, Model Rule 1.4(a)(2) states that a lawyer shall "reasonably consult with the client about the means by which the client's objectives are to be accomplished." Additionally, Model Rule 1.4(b) obligates lawyers to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Comment [5] to Rule 1.4 explains, "the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation." Considering these underlying principles, questions arise regarding whether and when lawyers might be required to disclose their use of GAI tools to clients pursuant to Rule 1.4.

The facts of each case will determine whether Model Rule 1.4 requires lawyers to disclose their GAI practices to clients or obtain their informed consent to use a particular GAI tool. Depending on the circumstances, client disclosure may be unnecessary.

Of course, lawyers must disclose their GAI practices if asked by a client how they conducted their work, or whether GAI technologies were employed in doing so, or if the client expressly requires disclosure under the terms of the engagement agreement or the client's outside counsel guidelines.[39] There are also situations where Model Rule 1.4 requires lawyers to discuss their use of GAI tools unprompted by the client.[40] For example, as discussed in the previous section, clients would need to be informed in advance, and to give informed consent, if the lawyer proposes to input information relating to the representation into the GAI tool.[41] Lawyers must also consult clients when the use of a GAI tool is relevant to the basis or reasonableness of a lawyer's fee.[42]

Client consultation about the use of a GAI tool is also necessary when its output will influence a significant decision in the representation,[43] such as when a lawyer relies on GAI

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[38] Baker v. Humphrey, 101 U.S. 494, 500 (1879).

[39] *See, e.g.*, MODEL RULES R. 1.4(a)(4) ("A lawyer shall . . . promptly comply with reasonable requests for information[.]").

[40] *See* MODEL RULES R. 1.4(a)(1) (requiring lawyers to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent" is required by the rules of professional conduct).

[41] See section B for a discussion of confidentiality issues under Rule 1.6.

[42] See section F for a discussion of fee issues under Rule 1.5.

[43] Guidance may be found in ethics opinions requiring lawyers to disclose their use of temporary lawyers whose involvement is significant or otherwise material to the representation. *See, e.g.*, Va. State Bar Legal Ethics Op. 1850, 2010 WL 5545407, at *5 (2010) (acknowledging that "[t]here is little purpose to informing a client every time a lawyer outsources legal support services that are truly tangential, clerical, or administrative in nature, or even when basic legal research or writing is outsourced without any client confidences being revealed"); Cal. State Bar, Standing Comm. on Prof'l Resp. & Conduct Op. 2004-165, 2004 WL 3079030, at *2–3 (2004) (opining that a

technology to evaluate potential litigation outcomes or jury selection. A client would reasonably want to know whether, in providing advice or making important decisions about how to carry out the representation, the lawyer is exercising independent judgment or, in the alternative, is deferring to the output of a GAI tool. Or there may be situations where a client retains a lawyer based on the lawyer's particular skill and judgment, when the use of a GAI tool, without the client's knowledge, would violate the terms of the engagement agreement or the client's reasonable expectations regarding how the lawyer intends to accomplish the objectives of the representation.

It is not possible to catalogue every situation in which lawyers must inform clients about their use of GAI. Again, lawyers should consider whether the specific circumstances warrant client consultation about the use of a GAI tool, including the client's needs and expectations, the scope of the representation, and the sensitivity of the information involved. Potentially relevant considerations include the GAI tool's importance to a particular task, the significance of that task to the overall representation, how the GAI tool will process the client's information, and the extent to which knowledge of the lawyer's use of the GAI tool would affect the client's evaluation of or confidence in the lawyer's work.

Even when Rule 1.6 does not require informed consent and Rule 1.4 does not require a disclosure regarding the use of GAI, lawyers may tell clients how they employ GAI tools to assist in the delivery of legal services. Explaining this may serve the interest of effective client communication. The engagement agreement is a logical place to make such disclosures and to identify any client instructions on the use of GAI in the representation.[44]

D. Meritorious Claims and Contentions and Candor Toward the Tribunal

Lawyers using GAI in litigation have ethical responsibilities to the courts as well as to clients. Model Rules 3.1, 3.3, and 8.4(c) may be implicated by certain uses. Rule 3.1 states, in part, that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert and issue therein, unless there is a basis in law or fact for doing so that is not frivolous." Rule 3.3 makes it clear that lawyers cannot knowingly make any false statement of law or fact to a tribunal or fail to correct a material false statement of law or fact previously made to a tribunal.[45] Rule 8.4(c) provides that a

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lawyer must disclose the use of a temporary lawyer to a client where the temporary lawyer's use constitutes a "significant development" in the matter and listing relevant considerations); N.Y. State Bar Ass'n, Comm on Prof'l Ethics 715, at 7 (1999) (opining that "whether a law firm needs to disclose to the client and obtain client consent for the participation of a Contract lawyer depends upon whether client confidences will be disclosed to the lawyer, the degree of involvement of the lawyer in the matter, and the significance of the work done by the lawyer"); D.C. Bar Op. 284, at 4 (1988) (recommending client disclosure "whenever the proposed use of a temporary lawyer to perform work on the client's matter appears reasonably likely to be material to the representation or to affect the client's reasonable expectations"); Fla. State Bar Ass'n, Comm. on Prof'l Ethics Op. 88-12, 1988 WL 281590, at *2 (1988) (stating that disclosure of a temporary lawyer depends "on whether the client would likely consider the information material");.

[44] For a discussion of what client notice and informed consent under Rule 1.6 may require, see section B.

[45] MODEL RULES R. 3.3(a) reads: "A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if

lawyer shall not engage in "conduct involving dishonesty, fraud, deceit or misrepresentation." Even an unintentional misstatement to a court can involve a misrepresentation under Rule 8.4(c). Therefore, output from a GAI tool must be carefully reviewed to ensure that the assertions made to the court are not false.

Issues that have arisen to date with lawyers' use of GAI outputs include citations to nonexistent opinions, inaccurate analysis of authority, and use of misleading arguments.[46]

Some courts have responded by requiring lawyers to disclose their use of GAI.[47] As a matter of competence, as previously discussed, lawyers should review for accuracy all GAI outputs. In judicial proceedings, duties to the tribunal likewise require lawyers, before submitting materials to a court, to review these outputs, including analysis and citations to authority, and to correct errors, including misstatements of law and fact, a failure to include controlling legal authority, and misleading arguments.

E. Supervisory Responsibilities

Model Rules 5.1 and 5.3 address the ethical duties of lawyers charged with managerial and supervisory responsibilities and set forth those lawyers' responsibilities with regard to the firm, subordinate lawyers, and nonlawyers. Managerial lawyers must create effective measures to ensure that all lawyers in the firm conform to the rules of professional conduct,[48] and supervisory lawyers must supervise subordinate lawyers and nonlawyer assistants to ensure that subordinate lawyers and nonlawyer assistants conform to the rules.[49] These responsibilities have implications for the use of GAI tools by lawyers and nonlawyers.

Managerial lawyers must establish clear policies regarding the law firm's permissible use of GAI, and supervisory lawyers must make reasonable efforts to ensure that the firm's lawyers and nonlawyers comply with their professional obligations when using GAI tools.[50] Supervisory obligations also include ensuring that subordinate lawyers and nonlawyers are trained,[51] including in the ethical and practical use of the GAI tools relevant to their work as well as on risks associated with relevant GAI use.[52] Training could include the basics of GAI technology, the capabilities and limitations of the tools, ethical issues in use of GAI and best practices for secure data handling, privacy, and confidentiality.

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necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false."

[46] *See* DC Bar Op. 388 (2024).

[47] Lawyers should consult with the applicable court's local rules to ensure that they comply with those rules with respect to AI use. As noted in footnote 4, no one opinion could address every ethics issue presented when a lawyer uses GAI. For example, depending on the facts, issues relating to Model Rule 3.4(c) could be presented.

[48] *See* MODEL RULES R. 1.0(c) for the definition of firm.

[49] ABA Formal Op. 08-451, *supra* note 15.

[50] MODEL RULES R. 5.1.

[51] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014).

[52] *See generally*, MODEL RULES R. 1.1, cmt. [8]. One training suggestion is that all materials produced by GAI tools be marked as such when stored in any client or firm file so future users understand potential fallibility of the work.

Lawyers have additional supervisory obligations insofar as they rely on others outside the law firm to employ GAI tools in connection with the legal representation. Model Rule 5.3(b) imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's conduct conforms with the professional obligations of the lawyer. Earlier opinions recognize that when outsourcing legal and nonlegal services to third-party providers, lawyers must ensure, for example, that the third party will do the work capably and protect the confidentiality of information relating to the representation.[53] These opinions note the importance of: reference checks and vendor credentials; understanding vendor's security policies and protocols; familiarity with vendor's hiring practices; using confidentiality agreements; understanding the vendor's conflicts check system to screen for adversity among firm clients; and the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement. These concepts also apply to GAI providers and tools.

Earlier opinions regarding technological innovations and other innovations in legal practice are instructive when considering a lawyer's use of a GAI tool that requires the disclosure and storage of information relating to the representation.[54] In particular, opinions developed to address cloud computing and outsourcing of legal and nonlegal services suggest that lawyers should:

- ensure that the [GAI tool] is configured to preserve the confidentiality and security of information, that the obligation is enforceable, and that the lawyer will be notified in the event of a breach or service of process regarding production of client information;[55]
- investigate the [GAI tool's] reliability, security measures, and policies, including limitations on the [the tool's] liability;[56]
- determine whether the [GAI tool] retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information;[57] and
- understand the risk that [GAI tool servers] are subject to their own failures and may be an attractive target of cyber-attacks.[58]

F. Fees

Model Rule 1.5, which governs lawyers' fees and expenses, applies to representations in which a lawyer charges the client for the use of GAI. Rule 1.5(a) requires a lawyer's fees and expenses to be reasonable and includes a non-exclusive list of criteria for evaluating whether a fee

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[53] ABA Formal Op. 08-451, *supra* note 15; ABA Formal. Op. 477R, *supra* note 6.
[54] *See* ABA Formal Op. 08-451, *supra* note 15.
[55] Fla. Bar Advisory Op. 12-3 (2013).
[56] *Id.* citing Iowa State Bar Ass'n Comm. on Ethics & Practice Guidelines Op. 11-01 (2011) [hereinafter Iowa Ethics Opinion 11-01].
[57] Fla. Bar Advisory Op. 24-1, *supra* note 4; Fla. Bar Advisory Op. 12-3, *supra* note 55; Iowa Ethics Opinion 11-01, *supra* note 56.
[58] Fla. Bar Advisory Op. 12-3, *supra* note 55; *See generally* Melissa Heikkila, *Three Ways AI Chatbots are a Security Disaster*, MIT TECHNOLOGY REVIEW (Apr. 3, 2023), www.technologyreview.com/2023/04/03/1070893/three-ways-ai-chatbots-are-a-security-disaster/.

or expense is reasonable.[59] Rule 1.5(b) requires a lawyer to communicate to a client the basis on which the lawyer will charge for fees and expenses unless the client is a regularly represented client and the terms are not changing. The required information must be communicated before or within a reasonable time of commencing the representation, preferably in writing. Therefore, before charging the client for the use of the GAI tools or services, the lawyer must explain the basis for the charge, preferably in writing.

GAI tools may provide lawyers with a faster and more efficient way to render legal services to their clients, but lawyers who bill clients an hourly rate for time spent on a matter must bill for their actual time. ABA Formal Ethics Opinion 93-379 explained, "the lawyer who has agreed to bill on the basis of hours expended does not fulfill her ethical duty if she bills the client for more time than she has actually expended on the client's behalf."[60] If a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the GAI program, the lawyer may charge for the 15 minutes as well as for the time the lawyer expends to review the resulting draft for accuracy and completeness. As further explained in Opinion 93-379, "If a lawyer has agreed to charge the client on [an hourly] basis and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter,"[61] because "[t]he client should only be charged a reasonable fee for the legal services performed."[62] The "goal should be solely to compensate the lawyer fully for time reasonably expended, an approach that if followed will not take advantage of the client."[63]

The factors set forth in Rule 1.5(a) also apply when evaluating the reasonableness of charges for GAI tools when the lawyer and client agree on a flat or contingent fee.[64] For example, if using a GAI tool enables a lawyer to complete tasks much more quickly than without the tool, it may be unreasonable under Rule 1.5 for the lawyer to charge the same flat fee when using the GAI tool as when not using it. "A fee charged for which little or no work was performed is an unreasonable fee."[65]

The principles set forth in ABA Formal Opinion 93-379 also apply when a lawyer charges GAI work as an expense. Rule 1.5(a) requires that disbursements, out-of-pocket expenses, or additional charges be reasonable. Formal Opinion 93-379 explained that a lawyer may charge the

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[59] The listed considerations are (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly; (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer; (3) the fee customarily charged in the locality for similar legal services; (4) the amount involved and the results obtained; (5) the time limitations imposed by the client or by the circumstances; (6) the nature and length of the professional relationship with the client; (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and (8) whether the fee is fixed or contingent.

[60] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379, at 6 (1993) [hereinafter ABA Formal Op. 93-379].

[61] *Id.*

[62] *Id.* at 5.

[63] *Id.*

[64] *See, e.g.*, *Williams Cos. v. Energy Transfer LP*, 2022 Del. Ch. LEXIS 207, 2022 WL 3650176 (Del. Ch. Aug. 25, 2022) (applying same principles to contingency fee).

[65] Att'y Grievance Comm'n v. Monfried, 794 A.2d 92, 103 (Md. 2002) (finding that a lawyer violated Rule 1.5 by charging a flat fee of $1,000 for which the lawyer did little or no work).

client for disbursements incurred in providing legal services to the client. For example, a lawyer typically may bill to the client the actual cost incurred in paying a court reporter to transcribe a deposition or the actual cost to travel to an out-of-town hearing.[66] Absent contrary disclosure to the client, the lawyer should not add a surcharge to the actual cost of such expenses and should pass along to the client any discounts the lawyer receives from a third-party provider.[67] At the same time, lawyers may not bill clients for general office overhead expenses including the routine costs of "maintaining a library, securing malpractice insurance, renting of office space, purchasing utilities, and the like."[68] Formal Opinion 93-379 noted, "[i]n the absence of disclosure to a client in advance of the engagement to the contrary," such overhead should be "subsumed within" the lawyer's charges for professional services.[69]

In applying the principles set out in ABA Formal Ethics Opinion 93-379 to a lawyer's use of a GAI tool, lawyers should analyze the characteristics and uses of each GAI tool, because the types, uses, and cost of GAI tools and services vary significantly. To the extent a particular tool or service functions similarly to equipping and maintaining a legal practice, a lawyer should consider its cost to be overhead and not charge the client for its cost absent a contrary disclosure to the client in advance. For example, when a lawyer uses a GAI tool embedded in or added to the lawyer's word processing software to check grammar in documents the lawyer drafts, the cost of the tool should be considered to be overhead. In contrast, when a lawyer uses a third-party provider's GAI service to review thousands of voluminous contracts for a particular client and the provider charges the lawyer for using the tool on a per-use basis, it would ordinarily be reasonable for the lawyer to bill the client as an expense for the actual out-of-pocket expense incurred for using that tool.

As acknowledged in ABA Formal Opinion 93-379, perhaps the most difficult issue is determining how to charge clients for providing in-house services that are not required to be included in general office overhead and for which the lawyer seeks reimbursement. The opinion concluded that lawyers may pass on reasonable charges for "photocopying, computer research, . . . and similar items" rather than absorbing these expenses as part of the lawyers' overhead as many lawyers would do.[70] For example, a lawyer may agree with the client in advance on the specific rate for photocopying, such as $0.15 per page. Absent an advance agreement, the lawyer "is obliged to charge the client no more than the direct cost associated with the service (i.e., the actual cost of making a copy on the photocopy machine) plus a reasonable allocation of overhead expenses directly associated with the provision of the service (e.g., the salary of the photocopy machine operator)."[71]

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[66] ABA Formal Op. 93-379 at 7.
[67] *Id.* at 8.
[68] *Id.* at 7.
[69] *Id.*
[70] *Id.* at 8.
[71] *Id.* Opinion 93-379 also explained, "It is not appropriate for the Committee, in addressing ethical standards, to opine on the various accounting issues as to how one calculates direct cost and what may or may not be included in allocated overhead. These are questions which properly should be reserved for our colleagues in the accounting profession. Rather, it is the responsibility of the Committee to explain the principles it draws from the mandate of Model Rule 1.5's injunction that fees be reasonable. Any reasonable calculation of direct costs as well as any reasonable allocation of related overhead should pass ethical muster. On the other hand, in the absence of an agreement to the contrary, it is impermissible for a lawyer to create an additional source of profit for the law firm beyond that which is contained in the provision of professional services themselves. The lawyer's stock in trade is the sale of legal services, not photocopy paper, tuna fish sandwiches, computer time or messenger services." *Id.*

These same principles apply when a lawyer uses a proprietary, in-house GAI tool in rendering legal services to a client. A firm may have made a substantial investment in developing a GAI tool that is relatively unique and that enables the firm to perform certain work more quickly or effectively. The firm may agree in advance with the client about the specific rates to be charged for using a GAI tool, just as it would agree in advance on its legal fees. But not all in-house GAI tools are likely to be so special or costly to develop, and the firm may opt not to seek the client's agreement on expenses for using the technology. Absent an agreement, the firm may charge the client no more than the direct cost associated with the tool (if any) plus a reasonable allocation of expenses directly associated with providing the GAI tool, while providing appropriate disclosures to the client consistent with Formal Opinion 93-379. The lawyer must ensure that the amount charged is not duplicative of other charges to this or other clients.

Finally, on the issue of reasonable fees, in addition to the time lawyers spend using various GAI tools and services, lawyers also will expend time to gain knowledge about those tools and services. Rule 1.1 recognizes that "[c]ompetent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment [8] explains that "[t]o maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engaging in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."[72] Lawyers must remember that they may not charge clients for time necessitated by their own inexperience.[73] Therefore, a lawyer may not charge a client to learn about how to use a GAI tool or service that the lawyer will regularly use for clients because lawyers must maintain competence in the tools they use, including but not limited to GAI technology. However, if a client explicitly requests that a specific GAI tool be used in furtherance of the matter and the lawyer is not knowledgeable in using that tool, it may be appropriate for the lawyer to bill the client to gain the knowledge to use the tool effectively. Before billing the client, the lawyer and the client should agree upon any new billing practices or billing terms relating to the GAI tool and, preferably, memorialize the new agreement.

III. Conclusion

Lawyers using GAI tools have a duty of competence, including maintaining relevant technological competence, which requires an understanding of the evolving nature of GAI. In

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[72] MODEL RULES R. 1.1, cmt. [8] (emphasis added); *see also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 498 (2021).

[73] Heavener v. Meyers, 158 F. Supp. 2d 1278 (E.D. Okla. 2001) (five hundred hours for straightforward Fourth Amendment excessive-force claim and nineteen hours for research on Eleventh Amendment defense indicated excessive billing due to counsel's inexperience); *In re* Poseidon Pools of Am., Inc., 180 B.R. 718 (Bankr. E.D.N.Y. 1995) (denying compensation for various document revisions; "we note that given the numerous times throughout the Final Application that Applicant requests fees for revising various documents, Applicant fails to negate the obvious possibility that such a plethora of revisions was necessitated by a level of competency less than that reflected by the Applicant's billing rates"); Att'y Grievance Comm'n v. Manger, 913 A.2d 1 (Md. 2006) ("While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client."); *In re* Hellerud, 714 N.W.2d 38 (N.D. 2006) (reduction in hours, fee refund of $5,651.24, and reprimand for lawyer unfamiliar with North Dakota probate work who charged too many hours at too high a rate for simple administration of cash estate; "it is counterintuitive to charge a higher hourly rate for knowing less about North Dakota law").

using GAI tools, lawyers also have other relevant ethical duties, such as those relating to confidentiality, communication with a client, meritorious claims and contentions, candor toward the tribunal, supervisory responsibilities regarding others in the law office using the technology and those outside the law office providing GAI services, and charging reasonable fees. With the ever-evolving use of technology by lawyers and courts, lawyers must be vigilant in complying with the Rules of Professional Conduct to ensure that lawyers are adhering to their ethical responsibilities and that clients are protected.

FLORIDA BAR ETHICS OPINION
OPINION 24-1
January 19, 2024

Advisory ethics opinions are not binding.

Lawyers may use generative artificial intelligence ("AI") in the practice of law but must protect the confidentiality of client information, provide accurate and competent services, avoid improper billing practices, and comply with applicable restrictions on lawyer advertising. Lawyers must ensure that the confidentiality of client information is protected when using generative AI by researching the program's policies on data retention, data sharing, and self-learning. Lawyers remain responsible for their work product and professional judgment and must develop policies and practices to verify that the use of generative AI is consistent with the lawyer's ethical obligations. Use of generative AI does not permit a lawyer to engage in improper billing practices such as double-billing. Generative AI chatbots that communicate with clients or third parties must comply with restrictions on lawyer advertising and must include a disclaimer indicating that the chatbot is an AI program and not a lawyer or employee of the law firm. Lawyers should be mindful of the duty to maintain technological competence and educate themselves regarding the risks and benefits of new technology.

RPC: 4-1.1; 4-1.1 Comment; 4-1.5(a); 4-1.5(e); 4-1.5(f)(2); 4-1.5(h); 4-1.6; 4-1.6 Comment; 4-1.6(c)(1); 4-1.6(e); 4-1.18 Comment; 4-3.1; 4-3.3; 4-4.1; 4-4.4(b); Subchapter 4-7; 4-7.13; 4-7.13(b)(3); 4-7.13(b)(5); 4-5.3(a)

OPINIONS: 76-33 & 76-38, Consolidated; 88-6; 06-2; 07-2; 10-2; 12-3; ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993); Iowa Ethics Opinion 11-01; New York State Bar Ethics Opinion 842

CASES: *Mata v. Avianca*, 22-cv-1461, 2023 WL 4114965, at 17 (S.D.N.Y. June 22, 2023); *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 2d DCA 1992); *The Florida Bar v. Carlon*, 820 So. 2d 891, 899 (Fla. 2002); *Att'y Grievance Comm'n of Maryland v. Manger*, 913 A.2d 1 (Md. 2006)

The Florida Bar Board of Governors has directed the Board Review Committee on Professional Ethics to issue an opinion regarding lawyers' use of generative artificial intelligence ("AI"). The release of ChatGPT-3 in November 2022 prompted wide-ranging debates regarding lawyers' use of generative AI in the practice of law. While it is impossible to determine the impact generative AI will have on the legal profession, this opinion is intended to provide guidance to Florida Bar members regarding some of the ethical implications of these new programs.

Generative AI are "deep-learning models" that compile data "to generate statistically probable outputs when prompted." IBM, What is generative AI?, (April 20, 2023), https://research.ibm.com/blog/what-is-generative-AI (last visited 11/09/2023). Generative AI can create original images, analyze documents, and draft briefs based on written prompts. Often, these programs rely on large language models. The datasets utilized by generative AI large language models can include billions of parameters making it virtually impossible to determine

how a program came to a specific result. Tsedel Neeley, 8 Questions About Using AI Responsibly, Answered, Harv. Bus. Rev. (May 9, 2023).

While generative AI may have the potential to dramatically improve the efficiency of a lawyer's practice, it can also pose a variety of ethical concerns. Among other pitfalls, lawyers are quickly learning that generative AI can "hallucinate" or create "inaccurate answers that sound convincing." Matt Reynolds, vLex releases new generative AI legal assistant, A.B.A. J. (Oct. 17, 2023), https://www.abajournal.com/web/article/vlex-releases-new-generative-ai-legal-assistant (last visited 11/09/2023). In one particular incident, a federal judge sanctioned two unwary lawyers and their law firm following their use of false citations created by generative AI. *Mata v. Avianca*, 22-cv-1461, 2023 WL 4114965, at 17 (S.D.N.Y. June 22, 2023).

Even so, the judge's opinion explicitly acknowledges that "[t]echnological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance." Id. at 1.

Due to these concerns, lawyers using generative AI must take reasonable precautions to protect the confidentiality of client information, develop policies for the reasonable oversight of generative AI use, ensure fees and costs are reasonable, and comply with applicable ethics and advertising regulations.

Confidentiality

When using generative AI, a lawyer must protect the confidentiality of the client's information as required by Rule 4-1.6 of the Rules Regulating The Florida Bar. The ethical duty of confidentiality is broad in its scope and applies to all information learned during a client's representation, regardless of its source. Rule 4-1.6, Comment. Absent the client's informed consent or an exception permitting disclosure, a lawyer may not reveal the information. In practice, the most common exception is found in subdivision (c)(1), which permits disclosure to the extent reasonably necessary to "serve the client's interest unless it is information the client specifically requires not to be disclosed[.]" Rule 4-1.6(c)(1). Nonetheless, it is recommended that a lawyer obtain the affected client's informed consent prior to utilizing a third-party generative AI program if the utilization would involve the disclosure of any confidential information.

Rule 4-1.6(e) also requires a lawyer to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the client's representation." Further, a lawyer's duty of competence requires "an understanding of the benefits and risks associated with the use of technology[.]" Rule 4-1.1, Comment.

When using a third-party generative AI program, lawyers must sufficiently understand the technology to satisfy their ethical obligations. For generative AI, this specifically includes knowledge of whether the program is "self-learning." A generative AI that is "self-learning" continues to develop its responses as it receives additional inputs and adds those inputs to its existing parameters. Neeley, supra n. 2. Use of a "self-learning" generative AI raises the possibility that a client's information may be stored within the program and revealed in response to future inquiries by third parties.

Existing ethics opinions relating to cloud computing, electronic storage disposal, remote paralegal services, and metadata have addressed the duties of confidentiality and competence to prior technological innovations and are particularly instructive. In its discussion of cloud computing resources, Florida Ethics Opinion 12-3 cites to New York State Bar Ethics Opinion 842 and Iowa Ethics Opinion 11-01 to conclude that a lawyer should:

- Ensure that the provider has an obligation to preserve the confidentiality and security of information, that the obligation is enforceable, and that the provider will notify the lawyer in the event of a breach or service of process requiring the production of client information;
- Investigate the provider's reputation, security measures, and policies, including any limitations on the provider's liability; and
- Determine whether the provider retains information submitted by the lawyer before and after the discontinuation of services or asserts proprietary rights to the information.

While the opinions were developed to address cloud computing, these recommendations are equally applicable to a lawyer's use of third-party generative AI when dealing with confidential information.

Florida Ethics Opinion 10-2 discusses the maintenance and disposition of electronic devices that contain storage media and provides that a lawyer's duties extend from the lawyer's initial receipt of the device through the device's disposition, "including after it leaves the control of the lawyer." Opinion 10-2 goes on to reference a lawyer's duty of supervision and to express that this duty "extends not only to the lawyer's own employees but over entities outside the lawyer's firm with whom the lawyer contracts[.]" Id.

Florida Ethics Opinion 07-2 notes that a lawyer should only allow an overseas paralegal provider access to "information necessary to complete the work for the particular client" and "should provide no access to information about other clients of the firm." Additionally, while "[t]he requirement for informed consent from a client should be generally commensurate with the degree of risk involved[,]" including "whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services." Id. Again, this guidance seems equally applicable to a lawyer's use of generative AI.

Finally, Florida Ethics Opinion 06-2 provides that a lawyer should take reasonable steps to safeguard the confidentiality of electronic communications, including the metadata attached to those communications, and that the recipient should not attempt to obtain metadata information that they know or reasonably should know is not intended for the recipient. In the event that the recipient inadvertently receives metadata information, the recipient must "promptly notify the sender," as is required by Rule 4-4.4(b). Similarly, a lawyer using generative AI should take reasonable precautions to avoid the inadvertent disclosure of confidential information and should not attempt to access information previously provided to the generative AI by other lawyers.

It should be noted that confidentiality concerns may be mitigated by use of an inhouse generative AI rather than an outside generative AI where the data is hosted and stored by a third-party. If the use of a generative AI program does not involve the disclosure of confidential

information to a third-party, a lawyer is not required to obtain a client's informed consent pursuant to Rule 4-1.6.

Oversight of Generative AI

While Rule 4-5.3(a) defines a nonlawyer assistant as a "a person," many of the standards applicable to nonlawyer assistants provide useful guidance for a lawyer's use of generative AI.

First, just as a lawyer must make reasonable efforts to ensure that a law firm has policies to reasonably assure that the conduct of a nonlawyer assistant is compatible with the lawyer's own professional obligations, a lawyer must do the same for generative AI. Lawyers who rely on generative AI for research, drafting, communication, and client intake risk many of the same perils as those who have relied on inexperienced or overconfident nonlawyer assistants.

Second, a lawyer must review the work product of a generative AI in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals. Lawyers are ultimately responsible for the work product that they create regardless of whether that work product was originally drafted or researched by a nonlawyer or generative AI.

Functionally, this means a lawyer must verify the accuracy and sufficiency of all research performed by generative AI. The failure to do so can lead to violations of the lawyer's duties of competence (Rule 4-1.1), avoidance of frivolous claims and contentions (Rule 4-3.1), candor to the tribunal (Rule 4-3.3), and truthfulness to others (Rule 4-4.1), in addition to sanctions that may be imposed by a tribunal against the lawyer and the lawyer's client.

Third, these duties apply to nonlawyers "both within and outside of the law firm." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 498 (2021); see Fla. Ethics Op. 07-2. The fact that a generative AI is managed and operated by a third-party does not obviate the need to ensure that its actions are consistent with the lawyer's own professional and ethical obligations.

Further, a lawyer should carefully consider what functions may ethically be delegated to generative AI. Existing ethics opinions have identified tasks that a lawyer may or may not delegate to nonlawyer assistants and are instructive. First and foremost, a lawyer may not delegate to generative AI any act that could constitute the practice of law such as the negotiation of claims or any other function that requires a lawyer's personal judgment and participation.

Florida Ethics Opinion 88-6 notes that, while nonlawyers may conduct the initial interview with a prospective client, they must:

- Clearly identify their nonlawyer status to the prospective client;
- Limit questions to the purpose of obtaining factual information from the prospective client; and
- Not offer any legal advice concerning the prospective client's matter or the representation agreement and refer any legal questions back to the lawyer.

This guidance is especially useful as law firms increasingly utilize website chatbots for client intake. While generative AI may make these interactions seem more personable, it presents additional risks, including that a prospective client relationship or even a lawyer-client relationship has been created without the lawyer's knowledge.

The Comment to Rule 4-1.18 (Duties to Prospective Client) explains what constitutes a consultation:

> A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a "prospective client" within the meaning of subdivision (a).

Similarly, the existence of a lawyer-client relationship traditionally depends on the subjective reasonable belief of the client regardless of the lawyer's intent. *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 2d DCA 1992).

For these reasons, a lawyer should be wary of utilizing an overly welcoming generative AI chatbot that may provide legal advice, fail to immediately identify itself as a chatbot, or fail to include clear and reasonably understandable disclaimers limiting the lawyer's obligations.

Just as with nonlawyer staff, a lawyer should not instruct or encourage a client to rely solely on the "work product" of generative AI, such as due diligence reports, without the lawyer's own personal review of that work product.

Legal Fees and Costs

Rule 4-1.5(a) prohibits lawyers from charging, collecting, or agreeing to fees or costs that are illegal or clearly excessive while subdivision (b) provides a list of factors to consider when determining whether a fee or cost is reasonable. A lawyer must communicate the basis for fees and costs to a client and it is preferable that the lawyer do so in writing. Rule 4-1.5(e). Contingent fees and fees that are nonrefundable in any part must be explained in writing. Rule 4-1.5(e); Rule 4-1.5(f)(2).

Regarding costs, a lawyer may only ethically charge a client for the actual costs incurred on the individual client's behalf and must not duplicate charges that are already accounted for in

the lawyer's overhead. *See, The Florida Bar v. Carlon*, 820 So. 2d 891, 899 (Fla. 2002) (lawyer sanctioned for violations including a $500.00 flat administrative charge to each client's file); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 93-379 (1993) (lawyer should only charge clients for costs that reasonably reflect the lawyer's actual costs); Rule 4-1.5(h) (lawyers accepting payment via a credit plan may only charge the actual cost imposed on the transaction by the credit plan).

Regarding fees, a lawyer may not ethically engage in any billing practices that duplicate charges or that falsely inflate the lawyer's billable hours. Though generative AI programs may make a lawyer's work more efficient, this increase in efficiency must not result in falsely inflated claims of time. In the alternative, lawyers may want to consider adopting contingent fee arrangements or flat billing rates for specific services so that the benefits of increased efficiency accrue to the lawyer and client alike.

While a lawyer may separately itemize activities like paralegal research performed by nonlawyer personnel, the lawyer should not do so if those charges are already accounted for in the lawyer's overhead. Fla. Ethics Op. 76-33 & 76-38, Consolidated. In the alternative, the lawyer may need to consider crediting the nonlawyer time against the lawyer's own fees. Id. Florida Ethics Opinion 07-2 discusses the outsourcing of paralegal services in contingent fee matters and explains:

> The law firm may charge a client the actual cost of the overseas provider [of paralegal services], unless the charge would normally be covered as overhead. However, in a contingent fee case, it would be improper to charge separately for work that is usually otherwise accomplished by a client's own attorney and incorporated into the standard fee paid to the attorney, even if that cost is paid to a third-party provider.

Additionally, a lawyer should have sufficient general knowledge to be capable of providing competent representation. *See, e.g., Att'y Grievance Comm'n of Maryland v. Manger*, 913 A.2d 1 (Md. 2006). "While it may be appropriate to charge a client for case-specific research or familiarization with a unique issue involved in a case, general education or background research should not be charged to the client." Id. at 5.

In the context of generative AI, these standards require a lawyer to inform a client, preferably in writing, of the lawyer's intent to charge a client the actual cost of using generative AI. In all instances, the lawyer must ensure that the charges are reasonable and are not duplicative. If a lawyer is unable to determine the actual cost associated with a particular client's matter, the lawyer may not ethically prorate the periodic charges of the generative AI and instead should account for those charges as overhead. Finally, while a lawyer may charge a client for the reasonable time spent for case-specific research and drafting when using generative AI, the lawyer should be careful not to charge for the time spent developing minimal competence in the use of generative AI.

Lawyer Advertising

The advertising rules in Subchapter 4-7 of the Rules Regulating The Florida Bar include prohibitions on misleading content and unduly manipulative or intrusive advertisements.

Rule 4-7.13 prohibits a lawyer from engaging in advertising that is deceptive or inherently misleading. More specifically, subdivision (b) includes prohibitions on:

> (3) comparisons of lawyers or statements, words, or phrases that characterize a lawyer's or law firm's skills, experience, reputation, or record, unless the characterization is objectively verifiable; [and]
>
> * * *
>
> (5) [use of] a voice or image that creates the erroneous impression that the person speaking or shown is the advertising lawyer or a lawyer or employee of the advertising firm unless the advertisement contains a clear and conspicuous disclaimer that the person is not an employee or member of the law firm[.]

As noted above, a lawyer should be careful when using generative AI chatbot for advertising and intake purposes as the lawyer will be ultimately responsible in the event the chatbot provides misleading information to prospective clients or communicates in a manner that is inappropriately intrusive or coercive. To avoid confusion or deception, a lawyer must inform prospective clients that they are communicating with an AI program and not with a lawyer or law firm employee. Additionally, while many visitors to a lawyer's website voluntarily seek information regarding the lawyer's services, a lawyer should consider including screening questions that limit the chatbot's communications if a person is already represented by another lawyer.

Lawyers may advertise their use of generative AI but cannot claim their generative AI is superior to those used by other lawyers or law firms unless the lawyer's claims are objectively verifiable. Whether a particular claim is capable of objective verification is a factual question that must be made on a case-by-case basis.

Conclusion

In sum, a lawyer may ethically utilize generative AI technologies but only to the extent that the lawyer can reasonably guarantee compliance with the lawyer's ethical obligations. These obligations include the duties of confidentiality, avoidance of frivolous claims and contentions, candor to the tribunal, truthfulness in statements to others, avoidance of clearly excessive fees and costs, and compliance with restrictions on advertising for legal services. Lawyers should be cognizant that generative AI is still in its infancy and that these ethical concerns should not be treated as an exhaustive list. Rather, lawyers should continue to develop competency in their use of new technologies and the risks and benefits inherent in those technologies.

THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS
Opinion No. 705
February 2025

QUESTIONS PRESENTED

What ethical issues are raised under the Texas Disciplinary Rules of Professional Conduct by a lawyer's use of generative artificial intelligence in the practice of law?

STATEMENT OF FACTS

The public release of ChatGPT in late 2022 introduced many people (and many lawyers) to the concept of generative artificial intelligence. ChatGPT, like other generative AI tools, gives users the ability to rapidly generate new, seemingly human-crafted content in response to user prompts. Many generative AI tools are "large language" or "deep-learning models" that compile vast amounts of text and analyze it using machine learning and sophisticated algorithms to "create" responses to user inquiries. Due in part to the rapid commercial success of ChatGPT, other generative AI tools have proliferated.

Some lawyers soon realized that there could be ways to effectively utilize generative AI, including ChatGPT, in the practice of law. And some companies have designed generative AI tools specifically for the practice of law, to assist in tasks like contract review and management, due diligence, document review, research, and even initial drafting of letters, contracts, and briefs. But lawyers have already seen—and displayed, very publicly—the dangers that lurk in the improper use of these tools. The most famous example at this point is a case where lawyers were sanctioned for submitting a brief that cited non-existent judicial opinions made up by ChatGPT. *See Mata v. Avianca*, No. 22-cv-1461, 2023 WL 4114965 (S.D.N.Y. June 22, 2023). Indeed, many generative AI models have a tendency to "hallucinate," or create inaccurate or made-up answers that sound convincing.

The Committee issues this opinion in response to a request from the State Bar of Texas's Taskforce on Responsible AI in the Law to provide a high-level overview of ethical issues that may be implicated by the use of generative AI in the practice of law. The world of generative AI is rapidly developing and changing nearly every day. So this opinion does not purport to address every ethical issue that might arise now or in the future. Some of the issues raised here may soon be resolved or mooted by changes in the technology or industry practices. This opinion is intended only to provide a snapshot of potential ethical concerns at the moment and a restatement of certain ethical principles for lawyers to use as a guide regardless of where the technology goes.

DISCUSSION

Competence

Rule 1.01(a) of the Texas Disciplinary Rules of Professional Conduct provides, with limited exceptions, that a lawyer "shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence." The Rules define "competence" as the "possession or the ability to timely acquire the legal knowledge, skill, and training reasonably necessary for the representation of the client." *See* Preamble, Terminology. In prior Opinions, this Committee has applied Rule 1.01 to questions involving novel technologies and has concluded that this obligation extends to a lawyer's "technological competence," especially when it comes to preserving client confidential information. *See* Professional Ethics Committee Opinion 680 (September 2018) (addressing cloud-computing systems); Opinion 665 (December 2016) (addressing metadata in electronic documents). Comment 8 to Rule 1.01 confirms that lawyers "should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology."

Rule 1.01 almost certainly does not *require* the use of generative AI for any particular purpose in the practice of law, especially at the present moment where the technology is still developing and the cost-benefit analysis remains somewhat unclear. Still, lawyers should not "unnecessarily retreat[] from the use of new technology that may save significant time and money for clients." Opinion 680; *see also* comment 8 to Rule 1.01. What's clear even now is that *if* a lawyer opts to use a generative AI tool in the practice of law, the lawyer must have a reasonable and current understanding of the technology—because only then can the lawyer evaluate the associated risks of hallucinations or inaccurate answers, the limitations that may be imposed by the model's use of incomplete or inaccurate data, and the potential for exposing client confidential information. *Cf.* Opinion 680 (lawyer should acquire a general understanding of how cloud computing works before using in practice of law); Opinion 665 (similar for metadata). Several of those issues are discussed more fully below.

Confidentiality

Some of the greatest risks posed by the unthinking use of generative AI relate to confidentiality of client information. In general, a lawyer must not knowingly reveal client confidential information to any person other than those who are permitted to receive the information under Rule 1.05. This duty extends to both privileged information and all other information relating to a client or furnished by the client and acquired by the lawyer during the course of the representation. *See* Rule 1.05(a). A lawyer violates Rule 1.05 if the

lawyer knowingly reveals or uses either category of information in ways that exceed Rule 1.05's scope. *See also* Opinion 680 (explaining these principles).

The extent to which Rule 1.05 is implicated by the use of generative AI will depend on how a given program works and how a lawyer uses it. As with other research tools, there may be ways to use certain generative AI programs for general research purposes without revealing client confidential information. But by their very nature, many generative AI tools invite a "conversation" in which the lawyer—through his or her prompts to the generative AI tool—will explain relevant facts, legal theories, and arguments. These exchanges could, if nothing else, expose the lawyer's privileged mental impressions to the generative AI tool. One could also imagine a request for certain outputs from a generative AI tool—like a draft demand letter or a settlement agreement—that would require the lawyer to feed the generative AI program certain privileged or otherwise confidential facts related to the dispute. In any case where the lawyer intends to provide client confidential information to the program, Rule 1.05 will likely be implicated.

These concerns are especially relevant given the "self-learning" nature of many generative AI programs. A self-learning program is one that stores and incorporates user inputs into its existing datasets so as to continue refining its responses and improving operation of the service. In some ways, generative AI programs are attractive *because* of this ever-evolving nature. But that may make them inappropriate for legal work. The use of such self-learning programs poses a risk that the confidential information a lawyer inputs to the program may be stored within the program and revealed in responses to future inquiries by third parties. That is obviously unacceptable. So, with any generative AI tool, the lawyer should be reasonably satisfied that the program will not reveal confidential information to others or permit the use of such information to the disadvantage of the client. If the lawyer is not so satisfied, the lawyer should—at a minimum—not input any confidential information to the program without client consultation and consent.

This goes back to the duty of technological competence. Before any lawyer uses a generative AI product for client work, the lawyer must understand to a reasonable degree how the technology works and must take reasonable precautions to ensure that any client confidential information is protected. Drawing from this Committee's Opinion 680, such reasonable precautions may include:

(1) acquiring a general understanding of how the technology works;

(2) reviewing and potentially renegotiating the "terms of service" to which the lawyer submits when using the generative AI tool;

(3) learning about the data-security protections used by the generative AI tool—because even if the tool does not intentionally share inputs with other users, it may be particularly vulnerable to hacking of stored information; and

(4) training lawyers and staff about how to appropriately use generative AI tools while protecting client confidential information.

See Opinion 680. "These precautions do not require lawyers to become experts in technology; however, they do require lawyers to become and remain vigilant about data security issues from the outset of using a particular technology in connection with client confidential information." *Id.*

With all that said, there may be circumstances where it is permissible to use confidential information in conjunction with a generative AI program. Rules 1.05(c) and 1.05(d) allow a lawyer to disclose client confidential information in various circumstances, including where the use of third-party service providers is reasonably necessary to carry out the representation effectively. *See* Opinion 572 (June 2006) (copy service); Opinion 680 (cloud computing service). But the lawyer can only do so if he or she is reasonably confident that the confidential character of the information will be respected and protected by the service provider. *See id*. The same principles would apply to the use of a generative AI tool.

If a lawyer intends to use confidential information in conjunction with generative AI tools, the lawyer should consider informing clients about the associated risks and may need to secure client consent. The State Bar of California Standing Committee on Professional Responsibility and Conduct has recommended that lawyers inform their clients if generative AI tools will be used as part of their representation. *See* State Bar of California, Standing Committee on Professional Responsibility and Conduct, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law* (Nov. 16, 2023). Ethics opinions from the ABA and the Florida Bar go a step further and suggest that lawyers should obtain informed consent before using these tools. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 512 (2024) ("Generative Artificial Intelligence Tools"); Florida Bar Ethics Opinion 24-1 (2024). This Committee, in Opinion 680 concerning the risks of cloud-computing software, stated "[i]n some circumstances it may be appropriate to confer with a client regarding these risks as applicable to a particular matter and obtain a client's input regarding or consent to using" such new technology. At a minimum, Texas lawyers should engage in the same thoughtful analysis with respect to generative AI tools.

Oversight/Supervision

Though this should likely go without saying, a lawyer should always verify the accuracy of any responses received from a generative AI tool. But this principle apparently wasn't obvious to the ever-increasing number of lawyers who have been caught submitting made-up citations in court filings. So, the Committee will say it again: lawyers are responsible for the work product they submit regardless of who (or what) does the original research and drafting. That means lawyers cannot blindly rely upon or use answers given by generative AI tools. Lawyers who rely on generative AI for research, drafting, and communication risk many of the same perils as those who rely on inexperienced or overconfident nonlawyer assistants. *Cf.* Rule 5.03 (Responsibilities Regarding Nonlawyer Assistants).

A lawyer's failure to verify generative AI outputs can implicate a host of Rules, including Rule 1.01 (Competent and Diligent Representation), Rule 3.01 (Meritorious Claims and Contentions), Rule 3.03 (Candor Toward the Tribunal), and Rule 3.04 (Fairness in Adjudicatory Proceedings), among others. The best practice here, as with many other efficiency-enhancing tools in the law: AI-generated outputs can be used as a starting point for a lawyer's work, but must always be carefully analyzed for accuracy and quality. That said, a lawyer's duties require more than merely detecting and eliminating false AI-generated results—the lawyer is ultimately responsible for ensuring that the content is accurate and supports the client's interests.

A lawyer must also be aware of how various courts treat the use of generative AI. Some courts have issued standing orders or local rules prohibiting the use of generative AI to draft legal filings or at least requiring certain forms of disclosure; others have declined to issue any such rules at all. *Compare* N.D. Tex. LR 7.2(f) (disclosure rules for briefs prepared using generative artificial intelligence), *with* "Court Decision on Proposed Rule" (5th Cir. June 10, 2024) (declining to adopt special rule regarding the use of artificial intelligence in drafting briefs).

Fees

It's not hard to imagine how the effective use of generative AI tools might impact the fees that lawyers charge—after all, one of the most promising aspects of these tools is the possibility for lawyers to provide legal services more efficiently. In most typical hourly arrangements (depending on the agreement), a lawyer will likely be able to charge the client for the actual time the lawyer spends using a generative AI program for purposes of the representation, including to refine the program's outputs and check the work. A lawyer may not, however, charge hourly fees for the time that was "saved"

by using the generative AI program. As the District of Columbia Bar Association explained:

> [I]t goes without saying that a lawyer who has undertaken to bill on an hourly basis is never justified in charging a client for hours not actually expended. If a lawyer has agreed to charge the client on this basis (i.e., hourly), and it turns out that the lawyer is particularly efficient in accomplishing a given result, it nonetheless will not be permissible to charge the client for more hours than were actually expended on the matter. When that basis for billing the client has been agreed to, the economies associated with the result must inure to the benefit of the client.

D.C. Legal Ethics Opinion 388 (2024) (quoting D.C. Legal Ethics Opinion 267 (1996) and ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-379 (1993) ("Billing for Professional Fees, Disbursements and Other Expenses")). *See also* Florida Bar Ethics Opinion 24-1 ("Though generative AI programs may make a lawyer's work more efficient, this increase in efficiency must not result in falsely inflated claims of time.").

If the lawyer pays per use for a particular generative AI program, the lawyer may be able to collect those expenses from the client, as allowed by law and if the client accepts that arrangement. *See* Opinion 594. When a lawyer incurs per-use fees associated with a generative AI program, one could imagine a client agreeing to reimburse those expenses in much the same way some clients agree to pay for the use of traditional online research tools like Westlaw and LexisNexis. The lawyer will generally not be permitted to recover more than the amount of expenses actually incurred and paid to the generative AI provider. *Cf. id.*

CONCLUSION

While there may be many ways that generative AI can assist in the practice of law and benefit lawyers and clients alike, Texas lawyers must always be aware of the ethical issues that may arise in the use of generative AI. Among many other issues, lawyers should acquire basic technological competence before using any generative AI tool, should always ensure that the tool does not imperil confidential client information, should always verify the accuracy of any responses received from a generative AI tool, and should not charge clients for the time "saved" by using a generative AI program.

THE NEW YORK CITY BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2024-5: ETHICAL OBLIGATIONS OF LAWYERS AND LAW FIRMS RELATING TO THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW

TOPIC: The use of generative artificial intelligence by New York lawyers, law firms, legal departments, government law offices and legal assistance organizations.

DIGEST: This opinion provides general guidance on the use of tools that use generative artificial intelligence.

RULES: **1.1, 1.2(d), 1.3, 1.4, 1.5, 1.6, 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, 3.1, 3.3, 5.1, 5.2, 5.3, 7.1, 7.3, 8.4**

QUESTION: The availability of tools to assist lawyers in their practice that employ generative artificial intelligence has been dramatically expanding and continues to grow. What are the ethical issues that lawyers should consider when deciding whether to use these tools and, if the decision is made to do so, how to use them?

OPINION: When using generative artificial intelligence tools, a lawyer should take into account the duty of confidentiality, the obligation to avoid conflicts of interest, the duty of competence and diligence, the rules governing advertising and solicitation, the duty to comply with the law, the duty to supervise both lawyers and non-lawyers, the duty of subordinate attorneys, the duty to consult with clients, the duty of candor to tribunals, the prohibition on making non-meritorious claims and contentions, the limitations on what a lawyer may charge for fees and costs, and the prohibition on discrimination.

Introduction

Generative artificial intelligence ("Generative AI"), like any technology, must be used in a manner that comports with a lawyer's ethical obligations. General-purpose technology platforms offer AI chatbots. Legal research platforms tout "legal generative AI" that can draft, analyze documents, and provide legal citations. Even data management vendors offer Generative AI-assisted review, analytic, and visualization capabilities. This summary of currently available tools will likely soon be outdated because of the rapid evolution of Generative AI. This guidance, therefore, is general. We expect that this advice will be updated and supplemented in years to come to cover issues not yet anticipated.

This Opinion provides guidance on the ethical obligations of lawyers and law firms relating to the use of Generative AI. It follows and is consistent with the format used by the Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law released by the California State Bar's Standing Committee on Professional Responsibility and Conduct in November 2023.[1] This

[1] State Bar of Cal., Standing Comm. on Pro. Resp. & Conduct, *Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law* (Nov. 16. 2023) ("California Guidance"),

Opinion is in the same format as the California State Bar's guidance and contains multiple quotations from that guidance. Like the California State Bar and other bar associations that have addressed Generative AI,[2] we believe that when addressing developing areas, lawyers need guardrails and not hard-and-fast restrictions or new rules that could stymie developments. By including advice specifically based on New York Rules and practice, this Opinion is intended to be helpful to the New York Bar.

Applicable Authorities	New York Guidance
Duty of Confidentiality Rule 1.6	Generative AI systems are able to use information that is inputted, including prompts, uploaded data, documents, and other resources, to train AI. They may also share inputted information with third parties or use it for other purposes.[3] Even if a system does not use or share inputted information, it may lack "reasonable or adequate security."[4] Without client consent, a lawyer must not input confidential client information into any Generative AI system that will share the inputted confidential information with third parties.[5] Even with consent, a lawyer should "avoid entering details that can be used to identify the client."[6] Consent is not needed if no confidential client information is shared, for example through anonymization of client information. Generative AI systems that keep inputted information entirely within the firm's own protected databases, sometimes called "closed"

https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf; *see also* Am. Bar Ass'n, Formal Op. 512 (2024); Fla. Bar Bd. Rev. Comm. on Pro. Ethics, Op. 24-1 (2024); D.C. Bar Ethics Op. 388 (April 2024); N.J. STATE BAR ASS'N, TASK FORCE ON ARTIFICIAL INTELLIGENCE (AI) AND THE LAW: REPORT, REQUESTS, RECOMMENDATIONS, AND FINDINGS (2024), https://njsba.com/wp-content/uploads/2024/05/NJSBA-TASK-FORCE-ON-AI-AND-THE-LAW-REPORT-final.pdf; N.Y. STATE BAR ASS'N, REPORT & RECOMMENDATIONS OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON ARTIFICIAL INTELLIGENCE (2024), https://www.nycbar.org/wp-content/uploads/2024/06/20221290_AI_NYS_Judiciary.pdf. (All websites last accessed on Aug. 5, 2024).

[2] In general, this Opinion is consistent with the ABA, California Bar, Florida Bar, District of Columbia Bar, and New Jersey Bar opinions cited in Footnote 1. However, the New York State Bar suggests adoption of certain rules to address Generative AI, which we believe is premature because of the rapid pace of technological development and change. *See, e.g.*, N.Y. STATE BAR ASS'N, *supra*, at 53–56.

[3] Generative AI systems that share inputted information with third parties are sometimes called "open" systems.

[4] California Guidance at 2.

[5] Lawyers may wish to obtain advance client consent to use Generative AI that will involve sharing of client information, but, because such consent must be knowing, the client must understand the potential consequences of such information-sharing for the consent to be effective. *See* N.Y. State Op. 1020 ¶ 10 (a lawyer "may post and share documents using a 'cloud' data storage tool" that does not provide "reasonable protection to confidential client information" only where "the lawyer obtains informed consent from the client after advising the client of the relevant risks").

[6] *Id.*

	systems, do not present these risks. But a lawyer must not input any confidential information of the client into any Generative AI system that lacks adequate confidentiality and security protections, regardless of whether the system uses or shares inputted information, unless the client has given informed consent to the lawyer's doing so. Even with closed systems, a lawyer must take care that confidential information is not improperly shared with other persons at or clients of the same law firm, including persons who are prohibited access to the information because of an ethical wall.[7] A lawyer or law firm[8] should "consult with IT professionals or cybersecurity experts to the extent necessary for the lawyer or law firm to ensure that any Generative AI system in which a lawyer would input confidential client information adheres to stringent security, confidentiality, and data retention protocols."[9] A lawyer should review the system's Terms of Use. "A lawyer who intends to use confidential information in a Generative AI product should ensure that the provider does not share inputted information with third parties or use the information for its own use in any manner, including to train or improve its product," again without informed client consent.[10] Terms of Use can change frequently and a lawyer's obligation to understand the system's use of inputs is continuing. Accordingly, lawyers should periodically monitor Terms of Use or other information to learn about any changes that might compromise confidential information.[11] A law firm may wish to consider implementing policies and control procedures to regulate the use of confidential client information in Generative AI systems if the law firm is going to make use of such systems.
Conflicts of Interest	Where a Generative AI system uses client information, a law firm must ensure that the system implements any ethical screens required under the Rules. For example, if an ethical

[7] *See* Am. Bar Ass'n, Formal Op. 512 at 6-7 (2024).

[8] Consistent with Rule 1.0(h), in this Opinion "law firm" includes a private firm as well as qualified legal assistance organizations, government law offices and corporations, and other entities' legal departments.

[9] California Guidance at 2.

[10] *Id.*

[11] *See* N.Y. STATE BAR ASS'N, *supra*, at 58.

Rule 1.7; Rule 1.8; Rule 1.9; Rule 1.10; Rule 1.11; Rule 1.12	screen excludes a lawyer from any information or documents with respect to a client, the lawyer must be not exposed to such information or documents through the law firm's Generative AI systems.
Duties of Competence and Diligence Rule 1.1; Rule 1.3	A lawyer should be aware that currently Generative AI outputs may include historical information that is false, inaccurate, or biased. "A lawyer must ensure the competent use of technology, including the associated benefits and risks, and apply diligence and prudence with respect to facts and law."[12] "Before selecting and using a Generative AI tool, a lawyer should understand to a reasonable degree how the technology works, its limitations, and the applicable [T]erms of [U]se and other policies governing the use and exploitation of client data by the product."[13] A lawyer may wish to consider acquiring skills through a continuing legal education course. Consultation with IT professionals or cybersecurity experts may be appropriate as well. Generative AI outputs may be used as a starting point but must be carefully scrutinized. They should be critically analyzed for accuracy and bias, supplemented, and improved, if necessary. A lawyer must ensure that the input is correct and then critically review, validate, and correct the output of Generative AI "to ensure the content accurately reflects and supports the interests and priorities of the client in the matter at hand, including as part of advocacy for the client. The duty of competence requires more than the mere detection and elimination of false [Generative AI] outputs."[14] The use of Generative AI tools without the application of trained judgment by a lawyer is inconsistent with the competent and diligent practice of law. "A lawyer's professional judgment cannot be delegated to [G]enerative AI and remains the lawyer's responsibility at all times. A lawyer should take steps to avoid overreliance on Generative AI to such a degree that it hinders critical attorney analysis

[12] California Guidance at 2. There have been claims that certain Generative AI tools violate intellectual property rights of third parties. A lawyer planning to use a Generative AI tool should keep abreast of whether there are any such risks associated with the tool the lawyer plans to use.

[13] *Id.*

[14] *Id.* at 3.

	fostered by traditional research and writing. For example, a lawyer must supplement any Generative AI-generated research with human-performed research and supplement any Generative AI-generated argument with critical, human-performed analysis and review of authorities."[15]
Advertising and Solicitation Rule 7.1; Rule 7.3	Lawyers must not use Generative AI in a way that would circumvent their responsibilities under the Rules regarding marketing and solicitation. For example, a lawyer must not use Generative AI to make false statements, to search the internet for potential clients and send solicitations that would otherwise be prohibited under the Rules, or to pose as a real person to communicate with prospective clients.
Duty to Comply with the Law Rule 8.4; Rule 1.2(d)	"There are many relevant and applicable legal issues surrounding [G]enerative AI, including but not limited to compliance with AI-specific laws, privacy laws, cross-border data transfer laws, intellectual property laws, and cybersecurity concerns."[16] A lawyer must comply with the law and cannot counsel a client to engage in, or assist a client in conduct that the lawyer knows is, a violation of any law, rule, or ruling of a tribunal when using Generative AI tools.
Duty to Supervise Lawyers and Nonlawyers, Responsibilities of Subordinate Lawyers Rule 5.1; Rule 5.2; Rule 5.3; Rule 8.4	"Managerial and supervisory lawyers should establish clear policies regarding the permissible uses of [G]enerative AI and make reasonable efforts to ensure that the law firm adopts measures that give reasonable assurance that the law firm's lawyers and non-lawyers' conduct complies with their professional obligations when using [G]enerative AI. This includes providing training on the ethical and practical aspects, and pitfalls, of [G]enerative AI use. A subordinate lawyer must not use Generative AI at the direction of a supervisory lawyer in a manner that violates the subordinate lawyer's professional responsibility and obligations."[17] A subordinate lawyer should disclose to a supervisory lawyer the use of Generative AI that is not generally understood to be routinely used by lawyers.[18]

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Likewise, where a client provides citations to a lawyer, a lawyer must review the decisions to make sure that they are genuine and properly cited. *See United States v. Cohen*, No. 18-CR-602, 2024 WL 1193604 (S.D.N.Y. Mar. 20,

	A lawyer using a Generative AI chatbot for client intake purposes must adequately supervise the chatbot.[19] A high degree of supervision may be required if there is a likelihood that ethical problems may arise. For example, a chatbot may fail to disclose that it is not a lawyer or may attempt or appear to provide legal advice, increasing the risk that a prospective client relationship or a lawyer–client relationship could be created.
Communication Regarding Generative AI Use Rule 1.4; Rule 1.2	"A lawyer should evaluate … communication obligations throughout the representation based on the facts and circumstances, including the novelty of the technology, risks associated with [G]enerative AI use, scope of the representation, and sophistication of the client."[20] A lawyer should consider disclosing to the client the intent to use Generative AI that is not generally understood to be routinely used by lawyers as part of the representation,[21] particularly as part of an explanation of the lawyer's fees and disbursements. The disclosure will depend on circumstances including how the technology will be used, and the benefits and risks of such use. A lawyer should obtain client consent for Generative AI use if client confidences will be disclosed in connection with the use of Generative AI. A lawyer should review any applicable client instructions or guidelines that may restrict or limit the use of Generative AI. We note that, because Generative AI currently is used routinely by lawyers, when a lawyer receives a request from a client that Generative AI not be used at all, the lawyer should consider discussing the request with the client before agreeing to it.

2024) (criticizing an attorney-defendant and his counsel for citing "three cases that do not exist" where client provided citations hallucinated by Google Bard and counsel failed to check them).

[19] *See* Fla. Bar Bd. Rev. Comm. on Pro. Ethics, *supra* (section on Oversight of Generative AI).

[20] California Guidance at 4.

[21] Note that some Generative AI is routinely used. For example, Microsoft Word employs Generative AI in its auto-complete and grammar check functions. Westlaw, Lexis, and search engines also employ Generative AI. We do not mean to suggest that an attorney needs to disclose such uses of Generative AI. For a discussion of the importance of evaluating Generative AI tools based on intended users, see N.J. STATE BAR ASS'N, TASK FORCE ON ARTIFICIAL INTELLIGENCE (AI) AND THE LAW: REPORT, REQUESTS, RECOMMENDATIONS, AND FINDINGS 15–19 (2024) (discussing "AI Tools Intended for the Public" and "Tools Tailored for Legal Professionals"), https://njsba.com/wp-content/uploads/2024/05/NJSBA-TASK-FORCE-ON-AI-AND-THE-LAW-REPORT-final.pdf.

Candor to the Tribunal; and Meritorious Claims and Contentions Rule 1.2(c); Rule 3.1; Rule 3.3; Rule 1.16	A lawyer should recognize the risks posed by Generative AI-generated content. Generative AI tools can, and do, fabricate or "hallucinate" precedent."[22] They can also create "deepfakes"—media that appear to reflect actual events but are actually doctored or manufactured. "A lawyer must review all [G]enerative AI outputs," including but not limited to "analysis and citations to authority," for accuracy before use for client purposes and submission to a court or other tribunal.[23] If the lawyer suspects that a client may have provided the lawyer with Generative AI-generated evidence, a lawyer may have a duty to inquire.[24] A lawyer must correct any errors or misleading statements made to adversaries, the public, or the court.[25] "A lawyer should also check for any rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of [G]enerative AI."[26]
Charging for Work Produced by Generative AI and Generative AI Costs Rule 1.5	"A lawyer may use [G]enerative AI to more efficiently create work product and may charge for actual time spent (*e.g.*, crafting or refining [G]enerative AI inputs and prompts, or reviewing and editing [G]enerative AI outputs)."[27] A lawyer must not charge hourly fees for the time that would otherwise have been spent absent the use of Generative AI.[28] Lawyers may wish to consider

[22] A Stanford University study found that Generative AI chatbots from OpenAI, Inc., Google LLC, and Meta Platforms Inc. hallucinate "at least 75% of the time when answering questions about a court's core ruling." Isabel Gottlieb & Isaiah Poritz, *Popular AI Chatbots Found to Give Error-Ridden Legal Answers*, Bloomberg L. (Jan. 12, 2024), https://news.bloomberglaw.com/business-and-practice/legal-errors-by-top-ai-models-alarmingly-prevalent-study-says. Courts are already grappling with parties' citation to hallucinated precedents. *See generally Mata v. Avianca, Inc.*, No. 22-CV-1461, 2023 WL 4114964 (S.D.N.Y. June 22, 2023) (sanctioning attorneys for "submit[ing] non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT"); *Cohen*, 2024 WL 1193604; *see also* D.C. Bar, Ethics Op. 388 (2024) (discussing the dangers of hallucinations).

[23] California Guidance at 4.

[24] *See* N.Y. City Op. 2018-4 (discussing a lawyer's duty to inquire when asked to assist in a transaction that the lawyer suspects may involve a crime or fraud); *see also* ABA Op. 491 (2020); Colo. Bar Ass'n Ethics Comm., Formal Op. 142 (2021). These same standards apply when a lawyer suspects that a client may have given the lawyer fabricated evidence.

[25] *See* Rule 3.3.

[26] California Guidance at 4.

[27] *Id.*

[28] *Id.*

	developing alternative fee arrangements relating to the value of their work rather than time spent. Costs associated with Generative AI should be disclosed in advance to clients as required by Rule 1.5(b). The costs charged should be consistent with ethical guidance on disbursements and should comply with applicable law.[29] A lawyer may wish to consider appropriate use of Generative AI tools to minimize client cost as the use of Generative AI becomes more widespread.
Prohibition on Discrimination Rule 8.4	"Some [G]enerative AI is trained on biased [historical] information, and a lawyer should be aware of possible biases and the risks they may create when using [G]enerative AI (*e.g.*, to screen potential clients or employees)."[30]

[29] *See* ABA Op. 93-379 (1993).

[30] California Guidance at 4.

THE NEW YORK CITY BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

FORMAL OPINION 2025-6: ETHICAL ISSUES AFFECTING USE OF AI TO RECORD, TRANSCRIBE, AND SUMMARIZE CONVERSATIONS WITH CLIENTS

TOPIC: Use of Artificial Intelligence tools to record, transcribe, and create summaries of conversations between attorneys and clients.

DIGEST: This Opinion addresses how the New York Rules of Professional Conduct (the "Rules") impact audio and video calls between attorneys and their clients where either the attorney or the client may want to make use of an artificial intelligence ("AI") tool to record, transcribe and create a summary of the conversation. Attorneys are free to choose not to use AI to record such conversations, but electing to do so creates important ethical obligations. The opinion concludes that an attorney should obtain client consent before recording the call, should consider whether recording, transcribing and summarizing is tactically well-advised in the particular circumstances, including issues of confidentiality and privilege, and should check the work product for accuracy if there is a possibility the transcription or summary will be preserved and potentially relied upon. If an attorney knows that a client is recording a call with an AI tool, the lawyer should advise the client of the disadvantages of doing so.

RULES: Preamble [2]; Rules 1.1, 1.6, 5.1, 5.3, 8.4

QUESTION: What ethical issues should attorneys consider when using, or when clients use, AI-enabled communications tools that can record, transcribe, and summarize conversations with clients?

DISCUSSION:

Introduction

AI tools are becoming increasingly prevalent in legal practice, but as their use expands, so do the ethical issues they present. This opinion adds to the growing body of legal ethics opinions on the use of AI[1] by focusing on ethical issues that arise from the use of AI tools to record, transcribe, and summarize conversations with clients.[2]

The ability to record conversations between attorneys and clients is not new. Earlier New York ethics opinions addressed the recording of telephone conversations and concluded that an attorney generally may not record the conversation without informing the other participants in the

[1] *See*, New York City Bar Ass'n Pro. Ethics Comm. Op. 2024-5, Ethical Obligations of Lawyers and Law Firms Relating to the Use of Generative Artificial Intelligence in the Practice of Law, and opinions and reports cited in footnote 1 of that opinion.

[2] This opinion narrowly addresses the use of AI tools in conversations between lawyers and their clients. Similar, but different, considerations apply when these tools are used in intrafirm communications and in conversations between co-counsel or opposing lawyers, and conversations with witnesses, courts, and other third parties.

conversation.[3] In addition to the attorney's ethical duties, state law may require that both attorneys and clients disclose the intention to record the conversation and obtain the other individual's consent.[4]

However, the advent of AI tools that make use of recordings calls on us to revisit the existing opinions. For one thing, videoconferencing has become ubiquitous since the COVID-19 pandemic, and videoconferencing platforms such as Zoom and Teams, among others, can be programmed to make recordings a law firm's default option, requiring an affirmative act, often overlooked, to disable the recording feature. As a result, conversations between attorneys and clients are more likely to be recorded today than phone calls were in the past. More importantly, however, the prior ethics opinions assumed the more primitive technologies of their times: the use of magnetic tape and digital audio files that merely captured and preserved sounds that happened to include spoken words. Today's AI tools go several steps further, using (a) voice recognition technology not only to record words spoken, but to attribute those words to particular speakers to create transcripts, including in some cases use of biometric tools, and (b) generative AI to impute meaning and intention to those speakers to create written summaries.

The creation and existence of such AI-generated transcripts and summaries raise novel ethical issues. These ethical issues call on us to consider both the processes by which such transcripts and summaries are created and the legal consequences of the end products. Lawyers must be careful in their use of AI tools that record and summarize conversations with clients and consider when they should not use such tools. Of course, as with taping phone calls in the past, lawyers must not violate the Rules by deceptive conduct in their use of such tools. They must also be aware of the illegal use of such tools without consent, with respect not only to jurisdictions that require all-party consent to recordings but also to those that regulate the capture of biometric digital data (such as voices and images). The danger that AI-generated transcripts and summaries could effectively formalize everything that was said, including informal legal advice that an attorney

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[3] *See, e.g.* New York City Bar Ass'n Pro. Ethics Comm. Op. 2003-02, Undisclosed Taping of Conversations by Lawyers (opining that a lawyer may not, as a matter of routine practice, tape record conversations without disclosing that the conversation is being taped, but that a lawyer may engage in the undisclosed taping of a conversation if the lawyer has a reasonable basis for believing that disclosure of the recording would impair pursuit of a generally accepted societal good); New York State Bar Ass'n Comm. on Pro. Ethics Op. 328 (1974) (stating that except in special situations it is improper for an attorney engaged in private practice to electronically record a conversation with another attorney or any other person without first advising the other party); *but see* New York Cnty. Laws. Ass'n Op. 696 (1993) (concluding that a lawyer may secretly record telephone conversations with third parties, including other lawyers, provided one party to the conversation has consented and provided that such recording does not violate any applicable law or a specific ethical rule, but cautioning that there are risks to such a practice, including a client's feeling of betrayal and mistrust).

[4] New York is generally a one-party consent state and permits individuals to surreptitiously record their own calls. *See* N.Y. PENAL LAW §250.00 Eavesdropping; definition of terms, subsecs. (1) ("Wiretapping"), (2) ("Mechanical overhearing of a conversation"), and (6) ("Intercepting or accessing of an electronic communication"); N.Y. C.P.L.R §4506 Eavesdropping evidence; admissibility; motion to suppress in certain cases; *see also People v Badalamenti*, 124 A.D.3d 672, 673 (2d Dep't 2015) ("The New York eavesdropping statute is similar to the federal wiretap statute, in that both statutes require consent from at least one party to the conversation for the recording to be lawful. . . ."); and *People v. Clark (Connie)*, 19 Misc. 3d 6, 7-8 (App. Term, 2d Dep't 2008) (discussing PENAL LAW §250.00 and C.P.L.R. §4506). However, other states have different laws about recording calls, and one concern particular to AI is that AI tools are not yet capable of determining when recordings would violate these varying laws. Attorneys should therefore not rely on AI to determine whether recording is permitted by state substantive law.

might have offered to the client "off the cuff," argues for firm policies to govern the use of transcripts and summaries that have not been reviewed, corrected, and affirmatively adopted.[5]

These issues arise in two different contexts depending on whether it is the lawyer or the client who uses AI tools to preserve conversations. Accordingly, Section I discusses ethical issues that are implicated when attorneys use their own AI tools to record, transcribe, and summarize conversations with clients, and Section II discusses the vexing issues that may arise when it is the *client* rather than the attorney who has chosen to record the conversation using the client's own AI tools. Whether at the instance of the attorney or the client, recording, transcribing, and summarizing conversations using AI tools may be helpful in legal practice. But in all cases—and especially since the technologies at issue are still new and developing—attorneys have a *duty* under Rule 1.1 to acquire an understanding of the technical features of the tools they and their clients use and be alert to the ethical issues that might arise.

I. Ethical issues involved in use of AI tools by attorneys to record, transcribe, and summarize conversations with their clients

A. Client Consent

No specific Rule speaks to a lawyer's need to obtain prior client consent to record, transcribe or summarize communications. Rather, lawyers' general ethical prohibition against routinely recording conversations without consent—at least in a one-party consent state such as New York—is rooted in the overarching duty of loyalty that lawyers owe their clients[6] and in Rule 8.4's proscription that "A lawyer or law firm shall not: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation." This Association's last Formal Opinion ("Opinion 2003-02") on the subject made it clear that the ethics of surreptitiously recording calls turns primarily not on the other party's expectations that their lawyer is not doing so, but on the fundamental deception being played by the lawyer who does so without telling them.[7]

Nevertheless, the expectations of clients necessarily play a role in determining ethical conduct, and when speaking of AI-generated transcriptions and summaries those expectations must be more carefully considered. Given the Rules and past Opinions, as well as societal norms about the attorney-client relationship, clients may well expect their calls with their lawyers not to be recorded. On the other hand, clients surely expect lawyers to take notes during telephone calls and to reduce those notes to a summary of the call. Indeed, some calls may be so critical that a lawyer could be failing to act competently or diligently, in violation of Rules 1.1 and/or 1.3, if the lawyer

[5] Whether the recording of such a communication as described herein would be admissible as evidence or otherwise considered reliable is beyond the purview of this Committee and therefore beyond the scope of this opinion.

[6] "The touchstone of the client-lawyer relationship is the lawyer's obligation . . . to act with loyalty during the period of the representation." N.Y. Rules of Pro. Conduct Preamble [2].

[7] New York City Bar Ass'n Pro. Ethics Comm. Op. 2003-02 ("[W]e regard the state of mind of the recording's target to be considerably less relevant than the state of mind of the individual making the decision to engage in undisclosed taping. . . . [I]t cannot seriously be doubted that an individual who engages in undisclosed taping does so in the hope that the target is not expecting to be taped. Indeed, it is difficult to conceive of any other reason for failing to disclose that the conversation is being taped.")

does *not* memorialize them. Given that summaries of calls are expected, should a summary created by an AI tool be treated any differently than a summary written by the lawyer?

Insofar as we are discussing only the summary of the call itself, we do not see why one created by an AI tool should be treated any differently than one created by a lawyer. But AI-generated summaries involve more than just the resulting summary. The summary is the end product of an automated process that includes (a) a voice recording, (b) a written transcription of that recording in which an AI voice recognition tool identifies the speakers, which transcript is then (c) acted upon by generative AI to create the summary. Only if the intermediate products—the voice recording and the transcription—are eliminated from the process can it be said that the AI-generated summary is functionally the same as the attorney's own file memo of the call, and then only if the attorney has actually reviewed and corrected the AI summary prior to putting it in final form.

Therefore, it is the creation and existence of the predicate voice recording (transcribed or not) that makes the difference.[8] It is debatable whether, based on current technology, a summary derived from an AI-generated transcript of a recorded call will invariably be more accurate than one created from an attorney's notes, memory, and judgment. But even if it reliably were, in Opinion 2003-02 we concluded that "merely wishing to obtain an accurate record of what was said does not justify undisclosed taping." We see no reason to deviate from that conclusion.

But Opinion 2003-02 assumed, reasonably enough for the time, that any intentionally made recording would be retained presumably to prove what was actually said, either as formal evidence or as an aid to negotiation. We there recognized that knowing that one is being recorded will affect how one will speak:

> As attorneys are well aware, individuals tend to choose their words with greater care and precision when a verbatim record is being made and some individuals may not wish to speak at all under such circumstances. Undisclosed taping deprives an individual of the ability to make those choices. Undisclosed taping also confers upon the party making the tape the unfair advantage of being able to use the verbatim record if it helps his cause and to keep it concealed if it does not. In addition, because undisclosed taping has those effects, it therefore also has the potential effect of undermining public confidence in the integrity of the legal profession, which in turn undermines the ability of the legal system to function effectively.[9]

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[8] We deal here with recordings and transcriptions together. While they are two different tasks, any recording may be transcribed, regardless of the technology used, and many recordings are transcribed and always have been. Therefore, the creation of a transcript, even if generated by AI tools, does not significantly affect the analysis of this Opinion.

[9] New York City Bar Ass'n Pro. Ethics Comm. Op. 2003-02. These effects would exist in other contexts as well. For example, it would be equally unethical for an attorney to have a stenographer transcribing a telephone call without the client's knowledge, or a team of associates all quietly taking notes as silent witnesses when the client thought they were speaking only with one attorney. One can imagine an AI-powered communications tool as being a digital agent playing the roles of such stenographer or associates. The ethical issues of not disclosing its presence are the same for all.

As a general matter, those effects remain even if, unlike when calls were intentionally recorded, the summary created from the voice recording is all that remains in the attorney's file. Opinion 2003-02 did not consider the possibility of making a voice recording/transcription that is *not* retained. It is not clear for how long common communication tools like Zoom and Teams retain recordings and transcripts. But even if the recording and transcript themselves do not long survive, the resulting summary will be based on a verbatim record. Therefore, the reasons set forth in Opinion 2003-02, to the effect that clients may speak differently if they know they are being recorded, continue to be valid.[10] As a result, we conclude that clients must be notified, and their consent obtained, whenever their calls are being recorded by an AI-empowered system.[11]

Finally, as discussed in note 4, *supra*, lawyers must continue to be mindful that many states require two-party consent to lawfully record telephone calls. In addition, some states have enacted laws to protect biometric data, and such laws include "voiceprints" as protected information.[12] AI transcription tools use voiceprints derived from audio files of recorded conversations to generate transcripts and summaries. At this writing, New York does not have legislation governing biometric data, but there have been attempts to enact such laws, which may succeed in the future.[13] The use of AI tools to record, transcribe and summarize conversations may violate such laws if done without client knowledge and consent.

B. Confidentiality and privilege

Attorneys must safeguard all records of client communications to preserve confidentiality and privilege and carry out their ethical responsibilities under Rule 1.6. Attorneys also need to understand the implications for confidentiality and privilege of retaining a written record of conversations. There are risks in preserving the recordings of conversations with clients, as well as the competing risks in not doing so. For example, if the recording is preserved, if the client is later involved in litigation, the client may be able to use this evidence as part of an "advice of counsel" defense. On the other hand, a preserved recording of a client's unconsidered and

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[10] Moreover, they continue to be valid regardless of the accuracy of the recording and transcript that results, in the same way that an undisclosed taping of a call would be unethical even if the tape recorder malfunctioned or the resulting tape garbled by extraneous noise.

[11] What the prevalence of such systems may affect is the nature of the required notification and consent. When the practice was deemed unusual, it was reasonable to advise clients each time they were recorded. Today, recording of calls is much more prevalent. Even so, however, unless services like Zoom and Teams provide clear notice that the call is being recorded, the client should be notified, and consent obtained, each time a call is being recorded. Lawyers may also address issues of notice and consent in engagement letters. If a lawyer or firm adopts a policy not to retain recordings and transcripts, such a policy should be disclosed; but in such cases, that policy should be strictly followed. See subsection B below concerning the retention of such documents.

[12]Illinois, Texas, Colorado, Maryland, Oregon, and Washington currently have such laws. Similar laws specifically targeting biometric data have been proposed in other states, including New York and nearby Massachusetts and Pennsylvania. New Jersey and other states have general consumer privacy laws that would expressly or perhaps implicitly cover biometric data. The legislative map is too diverse to cover in depth here, but a convenient tracker of relevant legislation is available at https://www.bclplaw.com/en-US/events-insights-news/us-biometric-laws-and-pending-legislation-tracker.html. (All websites last accessed Dec. 2025)

[13] New York City has a biometric data protection law, but by its terms it does not appear to apply to lawyers or law firms. Local Law 3 of 2021, available at https://intro.nyc/local-laws/2021-3.

spontaneous remarks could provide evidence that an opponent might seek to rely on as evidence of fraudulent intent or the like.

Attorneys also should consider what privacy and security safeguards are in place in an AI tool to protect the data, including where data will be stored and for how long, how data might be retrievable through discovery, whether the tool uses such data for training, and whether there is a right to data deletion.[14] Because much of this will be under the control of the AI provider, rather than the firm, attorneys should advise clients of the risks of the loss of confidentiality and privilege, particularly, as discussed below, where clients are using their own AI tools.

C. Duty of competence

1. Reviewing transcripts and summaries for accuracy

In addition to the concerns discussed above about confidentiality and privilege, important issues of competence under Rule 1.1 are implicated in the use of AI tools to record conversations. As with any conversation with a client that the attorney intends to memorialize, the duty of competence implies that attorneys should independently review any recording, transcript, or summary of the conversation – whether prepared by another individual (other attorneys, firm employees, or clients), recorded through traditional electronic means, or generated by AI tools – to ensure that it accurately reflects the conversation. Attorneys should not simply rely on work products prepared by AI tools without independently verifying their accuracy. Likewise, if the AI tools have generated a legal analysis or recommended course of action as part of the summary, the attorneys should independently confirm that the legal analysis and recommendations are sound.[15]

These recordings and summaries may be relied upon, sometimes even years later, and the attorney should therefore review them soon after they are prepared and ensure that any necessary revisions are made. This includes carefully reviewing any informal advice that the attorneys may have offered without adequate time for full reflection, but which may take on greater weight because of the memorialization of the advice in a written transcript or summary.[16]

2. Acquiring an understanding of the AI tools being used

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[14] In addition, clients may themselves insist on using commercial facilities, at least on occasion. Because of the risk of disclosure in open systems, lawyers should be fully conversant with the commands of generally available remote meeting facilities like Zoom, Teams and similar products that may arise in the future. *See* New York City Bar Ass'n Pro. Ethics Comm. Op. 2024-5, note 1, *supra.*

[15] This is so, given the well-recognized tendency of AI tools to "hallucinate" non-existent sources or inaccurate information. Attorneys may not rely on AI-generated information without independently verifying it. For example, in many recent cases attorneys have faced the possibility of sanctions for failing to independently verify the accuracy of information generated by AI tools and citing nonexistent sources in their submissions to courts. *See, e.g., Rotonde v. Stewart Titles. Ins. Co.*, 86 Misc. 3d 1213(A) (Sup. Ct. Westchester Co. 2025) (declining to impose sanctions); *Matter of Samue*l, 82 Misc. 3d 616, 620 (Surrogate's Ct., Kings Co. 2024) (striking pleadings and scheduling hearing on possible sanctions); *Benjamin v. Costco Wholesale Corp.*, 779 F. Supp. 3d 341, 351 (E.D.N.Y. 2025) (imposing sanctions); *United States v. Cohen*, 724 F. Supp. 3d 251, 258-60 (S.D.N.Y. 2024) (declining to impose sanctions); *Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 459-66 (S.D.N.Y. 2023) (imposing sanctions).

[16] As discussed in Section II. *infra*, a particular challenge is presented when the client wants to use the client's own AI tool to record, transcribe, and summarize the conversation.

As part of their duty of competence under Rule 1.1, attorneys have a duty to acquire a facility with new legal technologies.[17] This includes being conversant with the AI tools they use or are being asked to use by clients. For AI tools used by attorneys or their clients, attorneys need to acquire an understanding of the following issues, among others[18]:

- What steps will be taken to ensure that the attorney, other firm employees, and the client understand at a non-technical level how the AI tool works?
- What are the terms of service with the provider of the AI tool that will be used?
- For videoconferencing platforms that have a default AI recording feature, how can this feature be disabled, if desired, and what can be done in case a conversation is inadvertently recorded (e.g. deleting the conversation with client permission)?

In addition, and consistent with the principles set out in New York City Bar Ass'n Pro. Ethics Comm. Op. 2024-5, note 1, *supra*, attorneys need to acquire an understanding of the security features provided by the AI tool – and their limitations – in order to address the concerns about confidentiality and privilege discussed above.

3. Training and supervising subordinate lawyers and other employees

As in other contexts, attorneys have a duty under Rules 5.1 and 5.3 to ensure that those they supervise understand their ethical duties and are competent to carry them out. This requires specific training in the use of AI tools and the ethical duties related to this, as well as ongoing supervision.[19]

II. Special issues arising from the use of AI tools by clients

The discussion to this point has focused primarily on ethical issues that arise when it is the attorneys who have chosen to employ AI tools to record, transcribe, and summarize conversations with clients. In situations involving the use of the attorney's own AI tools, they are largely under the control of the attorney. As discussed above, in order to exercise this control effectively, the requirement under Rule 1.1 that lawyers must be technologically competent means that lawyers must have sufficient mastery of and confidence in using the AI tools they incorporate into their law practices to be able to anticipate the ethical issues that may arise.

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[17] N.Y. Rules of Pro. Conduct r. 1.1 cmt. 8 states:

> To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer's practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

[18] Some of the issues on this list are adapted from the work of Hilary Bowman and Alex Paykin, *AI is in the Room: Responsible Adoption of AI in the Virtual Attorney-Client Conversation* (Powerpoint accompanying CLE Presentation for New York State Bar Association, July 29, 2025).

[19] *See* New York City Bar Ass'n Pro. Ethics Comm. Op. 2024-5, note 1, *supra*. The Committee recognizes that AI tools may be helpful to attorneys and clients who are hearing impaired or otherwise disabled. However, the conclusions of this Opinion do not change depending on how attorneys and clients intend to use the products of AI tools.

However, it is likely that clients will choose to use their own AI tools in conversations with their attorneys, a situation that is largely *outside* the control of the attorney. An attorney may not be familiar with the AI tools being used by the client and will not have possession of—or, potentially, even access to—the recordings, transcripts, and summaries prepared by the client's AI tool. Nor will the attorney have control of the tool's security features. This puts the attorney at risk of not being able to carry out the ethical responsibilities outlined above. In particular, both the attorney and the client may be at special risk later, should the client seek to rely on the summary, if the client does not provide the attorney with, or with access to summaries created by the tool, and an opportunity to verify the accuracy (or otherwise) of the summary.

As with so many ethical issues, problems can often be avoided if expectations are made clear at the outset of the representation. Because of the importance to attorneys of being able to use AI tools with which they are familiar and over which they have some degree of control, the ideal solution is for clients to agree not to use their own AI tools to record conversations with attorneys without advance notice to the attorneys.

If, however, clients insist on using tools that attorneys have not had an opportunity to approve, attorneys are faced with the dilemma of having to decide how best to protect the interests of the clients and the attorneys. Attorneys have several options, none of which presents a complete solution, but which may solve some issues depending on the circumstances:

- Attorneys may ask that conversations not be recorded.
- Attorneys should include provisions in retainer agreements stating that any recordings, transcripts, or summaries prepared by AI tools selected or used by the client will not be deemed dispositive or binding as against the attorneys unless they are promptly provided to the attorneys so that the attorneys may conduct independent reviews of the accuracy of these materials.[20]
- Because the storage of information obtained by client AI tools will not be under the attorneys' control, they should advise clients of the risks of the loss of confidentiality and privilege.[21]

Conclusion

The use of AI tools to record, transcribe, and summarize conversations between attorneys and clients implicates important ethical considerations.

As a threshold matter, both ethical and legal concerns require lawyers to notify clients in advance that their conversations will be recorded to create AI-generated summaries.

[20] Whether the clients will be required to pay for these reviews is an additional term that will have to be negotiated.

[21] *See* New York State Bar Ass'n, Comm. on Pro. Ethics, Op. 1020 (2014) ¶ 10 (a lawyer "may post and share documents using a 'cloud' data storage tool" that does not provide "reasonable protection to confidential client information" only where "the lawyer obtains informed consent from the client after advising the client of the relevant risks").

With respect to confidentiality and privilege, attorneys must safeguard all records of client communications to carry out their ethical responsibilities and must understand the implications for confidentiality and privilege – as well as risk management – of retaining a written record of conversations.

With respect to the duty of competence, attorneys should independently review any recording, transcript, or summary of the conversation – regardless of who or what has prepared it – to ensure that it accurately reflects the conversation.

Connected to the duties of confidentiality and competence, attorneys have a duty to ensure that those they supervise receive training in the use of AI tools and the ethical duties related to this, as well as ongoing supervision.

Especially complicated ethical issues arise when it is the *clients* who choose to use their own AI tools in conversations with their attorneys, a situation that is largely outside the control of the attorneys. This puts attorneys at risk of not being able to carry out their ethical responsibilities. One solution is to craft retainer agreements that seek to preclude clients from using their own AI tools in conversations with attorneys and provide that any recordings will be done by the attorneys' own AI tools. If, however, clients refuse to agree to such terms and insist on using their own or commercially available AI tools, attorneys should affirmatively disclaim responsibility for unreviewed AI-generated summaries of the conversations and otherwise warn the clients of the potential loss of confidentiality and privilege from using such tools.

Finally, in order for attorneys to competently navigate the various issues that arise when using AI in client communications, attorneys have a duty to acquire an understanding of the technical features of the AI tools they and their clients use.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, -v- BRADLEY HEPPNER, Defendant.

25 Cr. 503 (JSR)

MEMORANDUM

JED S. RAKOFF, U.S.D.J.:

At a pretrial conference in this matter held on February 10, 2026, the Court, after hearing the arguments of counsel, granted from the bench the Government's motion for a ruling that certain written exchanges that defendant Bradley Heppner had with a generative artificial intelligence ("AI") platform were not protected from Government inspection by either the attorney-client privilege or the work product doctrine. See ECF No. 22 ("Gov't Mot."). This Memorandum sets forth the reasons for the Court's ruling.

I. Background and Procedural History

Generative artificial intelligence tools have become increasingly prevalent across various domains of human activity. It has reliably been estimated, for instance, that more than half of United States households have adopted AI in some form. See Bond, Trends – Artificial Intelligence (2025), https://www.bondcap.com/report/pdf/Trends_Artificial_Intelligence.pdf at 59 (accessed February 12, 2026). Only three years after its release, one prominent AI platform is being used by more than 800 million people worldwide every week. Id. at 55. Yet the implications of AI for the law are only beginning to be explored.

Thus, the Court's ruling in this case appears to answer a question of first impression nationwide: whether, when a user communicates with a publicly available AI platform in connection with a pending criminal investigation, are the AI user's communications protected by attorney-client privilege or the work product doctrine?[1] For the reasons that follow, the answer is no.

On October 28, 2025, a grand jury in this District returned an indictment charging Heppner with securities fraud, wire fraud, conspiracy to commit securities fraud and wire fraud, making false statements to auditors, and falsifying corporate records. ECF No. 3. The indictment was unsealed on November 4, 2025, see ECF No. 4, and Heppner was arrested the following day in the Northern District of Texas. On November 10, 2025, Heppner pleaded not guilty before this Court to all the charges against him and was released on bond. See ECF Nos. 16, 18. Trial is set to commence April 6, 2026. See ECF No. 16.

The charges against Heppner arise from his alleged misconduct as an executive of several corporate entities, including the publicly traded company GWG Holdings, Inc. ("GWG"). See generally ECF No. 3. At a high level, the indictment charges that Heppner defrauded GWG's investors out of more than $150 million by making false representations about, and causing GWG to enter into undisclosed self-serving

[1] The Court is unaware of, and the parties have not identified, any case to date that has presented this issue. Most published decisions involving generative artificial intelligence have had to do with attorneys' misuse of that technology. That set of concerns is plainly not present here.

transactions concerning, two privately held companies that Heppner controlled, Beneficient Company Group, L.P. and Highland Consolidated L.P. See id. ¶¶ 1-3.

In connection with Heppner's arrest on November 4, 2025, agents with the Federal Bureau of Investigation executed a search warrant at Heppner's home and seized numerous documents and electronic devices. See Gov't Mot. at 3; ECF No. 23-1 at 1. Heppner's counsel later represented to the Government that among the seized materials were approximately thirty-one documents that memorialize communications that Heppner had with the generative AI platform "Claude," which is operated by the private company Anthropic. See Gov't Mot. at 3; ECF Nos. 23-1 23-2. According to Heppner's counsel, the documents represent communications between Heppner and Claude that took place "in 2025, after Mr. Heppner had received a grand jury subpoena [and] after it was clear with discussions with the government that Mr. Heppner was the target of this investigation." Transcript, February 10, 2026 ("Tr.") at 4. Without any suggestion from counsel that he do so, Heppner "prepared reports that outlined defense strategy, that outlined what he might argue with respect to the facts and the law that we anticipated that the government might be charging." Id. Thus, counsel asserted, Heppner "was preparing these reports in anticipation of a potential indictment." Id.

In exchanges with the Government, Heppner, through his counsel, asserted privilege over these documents (the "AI Documents"), arguing that (1) Heppner had inputted into Claude, among other things,

information that Heppner had learned from counsel; (2) Heppner had created the AI Documents for the purpose of speaking with counsel to obtain legal advice; and (3) Heppner had subsequently shared the contents of the AI Documents with counsel. See Gov't Mot. at 3-4, 11; ECF Nos. 23-2, 23-4, 23-5. Heppner's counsel conceded, however, that counsel "did not direct [Heppner] to run Claude searches." ECF No. 23-5. Pursuant to a "Privilege Protocol Stipulation," the Government and Heppner's counsel agreed that the Government would segregate the AI Documents and not inspect them pending the resolution of Heppner's claims of privilege, and Heppner's counsel listed the AI Documents in Heppner's privilege log. See Gov't Mot. at 3-4 & n.1; ECF Nos. 23-1, 23-2.

On February 6, 2026, the Government moved, in writing, for a ruling that the AI Documents are protected by neither the attorney-client privilege nor the work product doctrine. Gov't Mot. The Court heard oral argument on the Government's motion at the pretrial conference held on February 10, 2026, and, as noted, orally granted the motion.

II. Attorney-Client Privilege

It is well established that the attorney-client privilege attaches to, and protects from disclosure, "communications (1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice." United States v. Mejia, 655 F.3d 126, 132 (2d

Cir. 2011).[2] Courts construe the attorney-client privilege narrowly because it operates as an exception to the rule that "all relevant proof is essential" for a complete record and for "confidence in the fair administration of justice." In re Six Grand Jury Witnesses, 979 F.2d 939, 943 (2d Cir. 1992). See also, e.g., Calvin Klein Trademark Tr. v. Wachner, 198 F.R.D. 53, 55 (S.D.N.Y. 2000).

Applying these principles here, the AI Documents lack at least two, if not all three, elements of the attorney-client privilege. First, the AI Documents are not communications between Heppner and his counsel. Heppner does not, and indeed could not, maintain that Claude is an attorney. "In the absence of an attorney-client relationship, the discussion of legal issues between two non-attorneys is not protected by attorney-client privilege." E.g., In re OpenAI, Inc., Copyright Infringement Litig., 802 F. Supp. 3d 688, 699 (S.D.N.Y. 2025). Because Claude is not an attorney, see ECF No. 23-6, that alone disposes of Heppner's claim of privilege.

The Court is aware that some commentators have argued that whether Claude is an attorney is irrelevant because a user's AI inputs, rather than being communications, are more akin to the use of other Internet-based software, such as cloud-based word processing applications. But the use of such applications is not intrinsically privileged in any case, and the argument that Claude is like any other form of software

[2] Except where otherwise indicated, all quotations in this Memorandum omit citations, quotation marks, footnotes, brackets, ellipses, and other alterations in source material.

only cuts against the invocation of privilege because all "[r]ecognized privileges" require, among other things, "a trusting human relationship," such as, in the attorney-client context, a relationship "with a licensed professional who owes fiduciary duties and is subject to discipline." See Ira P. Robbins, Against an AI Privilege, JOLT Dig., Harvard L. Sch. (Nov. 7, 2025), https://jolt.law.harvard.edu/digest/against-an-ai-privilege. No such relationship exists, or could exist, between an AI user and a platform such as Claude.

Second, the communications memorialized in the AI Documents were not confidential. This is not merely because Heppner communicated with a third-party AI platform but also because the written privacy policy to which users of Claude consent provides that Anthropic collects data on both users' "inputs" and Claude's "outputs," that it uses such data to "train" Claude, and that Anthropic reserves the right to disclose such data to a host of "third parties," including "governmental regulatory authorities." See Anthropic, Privacy Policy (as of February 19, 2025), https://www.anthropic.com/legal/archive/ a2eecf43-807a-4a53-89dd-04c44c351138. The policy clearly puts Claude's users on notice that Anthropic, even in the absence of a subpoena compelling it to do so, may "disclose personal data to third parties in connection with claims, disputes[,] or litigation." Id. More generally, as another court in this District recently observed, AI users do not have substantial privacy interests in their "conversations with [another publicly accessible AI platform] which users voluntarily disclosed" to the platform and which the platform "retains in the normal course

of its business." In re OpenAI, Inc., Copyright Infringement Litig., No. 25 MD 3143, ECF No. 1021 at 3 (Jan. 5, 2026). For these reasons, Heppner could have had no "reasonable expectation of confidentiality in his communications" with Claude. See Mejia, 655 F.3d at 132-34. And the AI Documents are not like confidential notes that a client prepares with the intent of sharing them with an attorney because Heppner first shared the equivalent of his notes with a third-party, Claude. Cf. United States v. DeFonte, 441 F.3d 92, 95-96 (2d Cir. 2006) (per curiam).

Third, Heppner did not communicate with Claude for the purpose of obtaining legal advice. This issue perhaps presents a closer call because Heppner's counsel asserts that Heppner communicated with Claude for the "express purpose of talking to counsel." ECF No. 23-5. But, as Heppner's counsel also conceded, Heppner did not do so at the suggestion or direction of counsel. See id. (noting that counsel "did not direct [Heppner] to run Claude searches"). Had counsel directed Heppner to use Claude, Claude might arguably be said to have functioned in a manner akin to a highly trained professional who may act as a lawyer's agent within the protection of the attorney-client privilege. Cf. United States v. Adlman, 68 F.3d 1495, 1498-99 (2d Cir. 1995) (citing United States v. Kovel, 296 F.2d 918 (2d Cir. 1961)). But because Heppner communicated with Claude of his own volition, what matters for the attorney-client privilege is whether Heppner intended to obtain legal advice from Claude, not whether he later shared Claude's outputs with counsel. And Claude disclaims providing legal

advice. Indeed, when the Government asked Claude whether it could give legal advice, it responded that "I'm not a lawyer and can't provide formal legal advice or recommendations" and went on to recommend that a user "should consult with a qualified attorney who can properly assess your specific circumstances." ECF No. 23-6 at 1-2.

Thus, the communications between Heppner and Claude were not privileged at the time they took place.[3] Moreover, even assuming that Heppner intended to share these communications with his counsel and eventually did so, it is black-letter law that non-privileged communications are not somehow alchemically changed into privileged ones upon being shared with counsel. Thus, because the AI Documents "would not be privileged if they remained in [Heppner's] hands," they did not "acquire protection merely because they were transferred" to counsel. See Gould, Inc. v. Mitsui Min. & Smelting Co., Ltd., 825 F.2d 676, 679-80 (2d Cir. 1987).

III. Work Product Doctrine

Related to but distinct from the attorney-client privilege, the work product doctrine, "[a]t its core[,] . . . shelters the mental processes of the attorney, providing a privileged area within which

[3] At oral argument, Heppner's counsel suggested in passing that the AI Documents may be privileged because they "incorporated information that we had conveyed to Mr. Heppner over the course of our representation." Tr. at 3. But even if certain information that Heppner input into Claude was privileged, he waived the privilege by sharing that information with Claude and Anthropic, just as if he had shared it with any other third party. Further, in light of Anthropic's privacy policy discussed above, Heppner had no reasonable expectation that the inputs would not be shared with other third parties.

he can analyze and prepare his client's case." United States v. Nobles, 422 U.S. 225, 238 (1975). The doctrine "provides qualified protection for materials prepared by or at the behest of counsel in anticipation of litigation or for trial." In re Grand Jury Subpoenas Dated March 19, 2002, and August 2, 2002, 318 F.3d 379, 383 (2d Cir. 2003). As with the attorney-client privilege, the work product doctrine is not "lightly created nor expansively construed," id. (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)), and the Second Circuit has repeatedly held that the doctrine's purpose "is not generally promoted by shielding from discovery materials in an attorney's possession that were prepared neither by the attorney nor his agents," id. (citing Matter of Grand Jury Subpoenas Dated Oct. 22, 1991, and Nov. 1, 1991, 959 F.2d 1158 (2d Cir. 1992)). The doctrine's availability in reference to materials in the possession of a client "depends upon the existence of a real, rather than speculative, concern that the thought processes of [the client's] counsel in relation to pending or anticipated litigation would be exposed." Matter of Grand Jury Subpoenas, 959 F.2d at 1167 (quoting Gould, 825 F.2d at 680).

The AI Documents do not merit protection under the work product doctrine because, even assuming, arguendo, that they were prepared "in anticipation of litigation," In re Grand Jury Subpoenas, 318 F.3d at 383, they were nevertheless not "prepared by or at the behest of counsel," id., nor did they reflect defense counsel's strategy, see Matter of Grand Jury Subpoenas, 959 F.2d at 1167. As to the former, Heppner's counsel confirmed that the AI Documents "were prepared by

the defendant on his own volition." Tr. at 5. That means that Heppner was not acting as his counsel's agent when he communicated with Claude. As to the latter, counsel conceded that while the AI Documents did "affect" counsel's strategy going forward, they did not "reflect" counsel's strategy at the time that Heppner created them. See id.

At oral argument, Heppner resisted these conclusions by relying on two authorities. The first, Federal Rule of Criminal Procedure 16(b)(2)(A), is inapplicable on its face. That rule provides that, where the Government provides a defendant with pretrial discovery and the defendant thereby becomes obligated to satisfy the Government's pretrial discovery requests, the defendant's obligation does not extend to "discovery or inspection of reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense." Id. Here, however, the AI Documents were seized from Heppner, at the time of his arrest, pursuant to a search warrant the validity of which Heppner's counsel does not challenge. See Gov't Mot. at 3. The Government did not request them, and Heppner did not produce them, in pretrial discovery.

Heppner's second authority is Shih v. Petal Card, Inc., 565 F. Supp. 3d 557 (S.D.N.Y. 2021). In that case, a Magistrate Judge in this District authorized the plaintiff to withhold certain communications that she had with an individual who was then her lawyer, and later became her husband, that the plaintiff prepared in anticipation of litigation or for trial. The court held that the work product doctrine protected such communications, "regardless of whether [the

lawyer/husband] was acting as her counsel at the time, and without showing that another attorney 'directed the work.'" Id. at 574.

Shih, of course, is not binding on this Court, and this Court respectfully disagrees with its holding. As relevant here, the court in Shih principally concluded that the work product doctrine is not limited to materials prepared by or at the direction of an attorney. Id. But that conclusion undermines the policy animating the work product doctrine, which, as one of the cases cited in Shih explains, is "to preserve a zone of privacy in which a lawyer can prepare and develop legal theories and strategy 'with an eye toward litigation.'" Parneros v. Barnes & Noble, Inc., 332 F.R.D. 482, 492 (S.D.N.Y. 2019) (quoting United States v. Adlman, 134 F.3d 1194, 1996 (2d Cir. 1998) (quoting, in turn, Hickman v. Taylor, 329 U.S. 495, 510-11 (1947))); see Shih, 565 F. Supp. 3d at 574 (citing Parneros). While it is true that the work product doctrine may apply to materials generated by non-lawyers, the Second Circuit has repeatedly stressed that the purpose of the doctrine is to protect lawyers' mental processes. See, e.g., In re Grand Jury Subpoenas, 318 F.3d at 383-85 (extensively describing doctrine's rationale and applying it to material "prepared by or for counsel"); Adlman, 134 F.3d at 1197 (similar); Adlman, 68 F.3d at 1500-02 (similar); Matter of Grand Jury Subpoenas, 959 F.2d at 1166 (doctrine "generally does not shield from discovery documents that were not prepared by the attorneys themselves, or their agents"); see also Bice v. Robb, 511 F. App'x 108, 110 (2d Cir. 2013) (summary

order) (declining to extend protection to documents "not the work product of an individual acting as [plaintiffs'] attorney").

Here, there is no dispute that Heppner acted on his own when he created the AI Documents. See ECF No. 23-5 (noting that defense counsel "did not direct [Heppner] to run Claude searches"); Tr. at 5 (confirming same). Because the AI Documents were not prepared at the behest of counsel and did not disclose counsel's strategy, they do not merit protection as work product.

IV. Conclusion

Generative artificial intelligence presents a new frontier in the ongoing dialogue between technology and the law. Time will tell whether, as in the case of other technological advances, generative artificial intelligence will fulfill its promise to revolutionize the way we process information. But AI's novelty does not mean that its use is not subject to longstanding legal principles, such as those governing the attorney-client privilege and the work product doctrine. Because Heppner's use of Claude fails to satisfy either of these rules, the AI Documents do not merit the protections Heppner has claimed.

New York, NY
February 17, 2026

JED S. RAKOFF, U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SOHYON WARNER,

Plaintiff,

v.

GILBARCO, INC., GILBARCO, INC. (*d/b/a* GILBARCO VEEDER-ROOT), and VONTIER CORPORATION,

Defendants.
_____/

Case No. 2:24-cv-12333

District Judge Gershwin A. Drain
Magistrate Judge Anthony P. Patti

ORDER DENYING PLAINTIFF'S MOTION FOR SANCTIONS BASED ON NON-COMPLIANCE WITH A COURT ORDER (ECF No. 68), GRANTING IN PART, DENYING IN PART, AND DEEMING WITHDRAWN IN PART DEFENDANTS' MOTION TO COMPEL (ECF No. 80), and STRIKING THE NON-JOINT STATEMENT (ECF No. 89)

A. Pending Matters

On August 28, 2025, the Court entered an amended scheduling order, which set the fact discovery deadline for December 5, 2025. (ECF No. 41.) To date, the Undersigned has handled several discovery-related motions (*see*, *e.g.*, ECF No. 45, 47, 48, 49, 50) via orders dated September 26, 2025 (ECF No. 56) and October 30, 2025 (ECF No. 66).

Currently pending before the Court are: (1) Plaintiff's November 10, 2025 notice of Defendants' non-compliance with the Court's October 30, 2025 order and request for sanctions under Fed. R. Civ. P. 37 (ECF No. 68), as to which

Defendants filed a response (ECF No. 73), and Plaintiff filed a reply (ECF No. 77); and, (2) Defendants' December 23, 2025 motion to compel and request for sanctions (ECF No. 80), as to which Plaintiff has filed a response (ECF No. 86) and Defendants have filed a reply (ECF No. 87). Additionally, the parties have filed statements of resolved and unresolved issues. (*See* ECF Nos. 89, 90.)[1]

Judge Drain has referred each of these motions to me for hearing and determination (ECF No. 69, 81). The Undersigned conducted a video status conference on January 12, 2026. (ECF Nos. 85, 93.) Pursuant to the Court's January 13, 2026 notice, Plaintiff, on her own behalf, and defense counsel (Attorney Richard W. Warren) appeared on February 5, 2026 in person for a hearing on these motions. (ECF Nos. 82, 88.)

B. Order

1. Plaintiff's motion (ECF No. 68) is DENIED.

Upon consideration of the motion papers and the parties' arguments and representations at the hearing, and for all the reasons stated on the record by the

[1] Plaintiff's "notice" (ECF No. 68) has been treated as a motion. The usual path to gaining relief from the Court is to file a motion, and notices are generally not permitted unless previously requested by the Court (*e.g.*, ECF No. 51); more often than not, they are stricken. Plaintiff is cautioned about filing notices going forward, as she has, on more than one occasion, filed unauthorized "notices" on the docket. (*See, e.g.,* ECF No. 58, 68.) Also, Plaintiff's emergency supplement (ECF No. 72) was stricken pursuant to the Court's November 26, 2025 text-only order. Finally, at the February 5, 2026 motion hearing, the Court struck the non-joint statement (ECF No. 89) from the record.

Court, which are hereby incorporated by reference as though fully restated herein, Plaintiff's motion (ECF No. 68) is **DENIED** as set forth in the prayer for relief (*see* ECF No. 68, PageID.662-663 ¶¶ 1-6.):

- To the extent Plaintiff asked the Court to "[f]ind Defendants in non-compliance with ECF 66 and the Federal Rules of Civil Procedure[,]" the motion is **DENIED**. *Inter alia*, the Court agrees that Defendants complied with the direction regarding Bates ranges 162-462 (*see* ECF No. 66, PageID.630 ¶ 4), when it submitted its November 7, 2025 supplemental response (*see* ECF No. 73, PageID.735; ECF No. 73-1). To the extent that Defendants provided additional information after Court-ordered deadlines, the Court is satisfied that it did so in compliance with its duty to supplement under Fed. R. Civ. P. 26(e).

- To the extent Plaintiff asks Defendants to "[o]rder immediate, complete production of all comparator files, HR investigations, and ESI—requiring Defendants to re-run all searches using the expanded custodian and term list provided on October 27, 2025, and to re-produce the results in an organized, labeled format consistent with Rule 34(b)(2)(E)[,]" the motion is **DENIED**. Defense counsel, as an officer of the Court, provided answers to the Court's extensive questioning on this subject, and the Court is satisfied that Defendants have produced the comparator files (*see* ECF No. 68, PageID.651-653) within their

"possession, custody, or control[,]" Fed. R. Civ. P. 34(a)(1); thus, there is nothing for the Court to order. The two investigation reports listed in the privilege log will be addressed below.

Although not spelled out in her prayer for relief, Plaintiff complains that Defendants' production of Bates range 463-4427 on October 27, 2025 and November 7, 2025 did not comply with the Court's October 30, 2025 order (ECF No. 66). (ECF No. 68, PageID.656-658). However, Defendants' November 7, 2025 supplemental response reads: "Not long before Plaintiff's counsel withdrew their representation, Defendants agreed to run an ESI search with specific search parameters—date range: December 1, 2021 to December 31, 2023—custodians: Ivan Ayma, Emily Heuser, Rosanna Hurst and Robert Steffler—and the search terms below[,]" below which appears a list of search terms. (ECF No. 73-1, PageID.754.) Immediately below the chart of search terms, Defendants state: "As a result of this search, see documents at Bates Nos. G000463-1378 and G001379-4427." (ECF No. 73-1, PageID.754 [No. 16].) The Court finds that this suffices and complies with its prior order.

- To the extent Plaintiff asked the Court to "[r]equire Defendants to serve an updated, itemized privilege log identifying each withheld document with

sufficient detail to assess the claim of privilege, and to produce all non-privileged portions of the HR investigations[,]" the motion is **DENIED**. Instead, the Court performed Plaintiff's suggested *in camera* review. Having considered the two investigation reports listed on Defendants' November 21, 2025 privilege log (ECF No. 73-3), one by compliance counsel Kathy Martorell dated March 3, 2023 (*see* ECF No. 73-6) and the other by compliance investigator Kate S. Gibson dated December 14, 2022 (*see* ECF No. 73-4), along with the declarations filed in support of privileges with respect to those two documents, one by Kate Gibson, Esq. (ECF No. 73-5) and the other by Kathy Hunt, Esq. (ECF No. 73-7), the Court concludes these investigations and the reports they generated were done in anticipation of litigation, both subjectively and objectively, as opposed to the ordinary course of business. *See*, *e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 386 (1981); *Lee v. EUSA Pharma US LLC*, No. 2:22-CV-11145, 2024 WL 250064 (E.D. Mich. Jan. 23, 2024) (Patti, M.J.) (order after in camera review); *United States v. Nobles*, 422 U.S. 225, 238–39 (1975) ("the doctrine protect[s] material prepared by agents for the attorney as well as those prepared by the attorney himself."). Because these documents are protected by both the attorney-client privilege and the work product doctrine, the Court will not order their production. Although Plaintiff argued that any factual accounts given in those reports should be produced, the Court extensively questioned defense counsel at the hearing and

is satisfied that no witnesses interviewed by in-house counsel gave written, recorded, sworn, or transcribed verbatim statements. As this Court has noted, "even attorney interview notes of fact witnesses (if any exist), which are inevitably funneled through the attorney-interviewers' ears, minds, fingers and/or voices (if dictated), are also protected as work product and, thus, not discoverable." *Lee*, 2024 WL 250064, at *4. *See In re General Motors LLC Ignition Switch Lit.*, 80 F.Supp.3d 521, 532 (S.D.N.Y. 2015) ("[i]nterview notes and memoranda produced in the course of ... internal investigations have long been considered classic attorney work product.") As the Supreme Court has explained: "Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes . . . ." *Upjohn*, 449 U.S. at 399 (citation omitted). *See also United States v. One Tract of Real Prop. Together With all Bldgs., Improvements, Appurtenances & Fixtures*, 95 F.3d 422, 427 (6th Cir. 1996); 6 *Moore's Federal Practice* § 26.70[2][a] (Matthew Bender 3d ed.) ("Thus, while the facts themselves are not privileged, a chart or other compilation of facts may be protected as work product.").[2] The Court confirmed that Plaintiff was provided with all of the names of the people

[2] This is in contrast with *government* documents protected by the *deliberative process privilege*, where factual summaries may be discoverable because they are not "deliberative." *See EEOC v. Peoplemark, Inc.*, No. 1:08-cv-907, 2010 WL 748250, at *2 (W.D. Mich. Feb. 26, 2010).

interviewed by in-house counsel in the internal investigation, and, though she had the opportunity to depose them to obtain whatever factual information they had, she did not.

- To the extent Plaintiff asked the Court to "[i]mpose sanctions under [Fed. R. Civ. P. 37(b) and Fed. R. Civ. P. 26(g)] . . . [,]" such as assessing expenses and fees, deeming facts established, imposing an adverse inference / spoliation, imposing an evidentiary preclusion, deeming a privilege waived, or providing a warning of further sanctions, the motion is **DENIED**;

- To the extent Plaintiff asked the Court to "[d]irect Defendants to certify, under oath, the preservation and completeness of all ESI and hard-copy materials associated with departed custodians (Schoultz, Hurst, Blaser, McClellan, Posada, Heuser, and Martorell) and to describe their data-retention measures in writing[,]" the motion is **DENIED**, as that certification was given on the record in open court; and,

- To the extent Plaintiff sought an extension of the discovery period "to ensure Plaintiff receives a meaningful opportunity to review all compelled productions, conduct follow-up discovery, and complete depositions after

compliance is achieved[,]" the motion is **DENIED**. For example, although Plaintiff claims to have requested depositions of Human Resources (HR) in September 2025, she never took a deposition, purportedly because she did not have related documents. She also never sought to compel that deposition at any time, let alone within the discovery period. Nonetheless, defense counsel confirmed that Plaintiff was given a list of those witnesses interviewed in the investigation, and, as the Court explained from the bench, although documents may be beneficial in deposing a witness, they are not absolutely necessary; indeed, a deposition may sometimes be used to *identify* documents to be sought in discovery, the revelation of which may occasionally become the basis for continuing a deposition. If Plaintiff was concerned about the completeness of personnel records produced to her, she was free to explore the contents that she had been given and whether other material exists or should have been included in document productions by deposing the HR director or some other appropriate custodian. She did not avail herself of this opportunity.

Given the Court's denial of Plaintiff's motion, the Court has considered whether to require Plaintiff to pay Defendants their "reasonable expenses incurred in opposing the motion, including attorney's fees[,]" but the Court declines to do so, finding "the motion was substantially justified or other circumstances make an

award of expenses unjust[,]" Fed. R. Civ. P. 37(a)(5), particularly the need for the Court to engage in its *in camera* review. Plaintiff can hardly be faulted for making that request under these circumstances.

2. Defendants' motion (ECF No. 80) is GRANTED IN PART, DENIED IN PART, and DEEMED WITHDRAWN IN PART.

Upon consideration of the motion papers and the parties' arguments and representations at the hearing, and for all the reasons stated on the record by the Court, which are hereby incorporated by reference as though fully restated herein, Defendants' motion (ECF No. 80) is **GRANTED IN PART**, **DENIED IN PART**, and **DEEMED WITHDRAWN IN PART.** Preliminarily, the initial and amended scheduling orders provide: "Discovery shall be completed on or before the date set forth in the scheduling order. The court will not order discovery to take place subsequent to the discovery cutoff date." (ECF No. 14, PageID.81; ECF No. 41, PageID.257 (emphasis in original).) Judge Drain's and the Undersigned's Practice Guidelines contain similar provisions. (See www.mied.uscourts.gov.) Plaintiff served her responses to Defendants' second request to produce on October 23, 2025 (ECF No. 80-4), she was deposed on November 25, 2025, and the discovery deadline in this case was extended to December 5, 2025 (ECF No. 41, PageID.257.) Defendants have made no showing that it was impossible or impractical to have filed the December 23, 2025 motion before the close of discovery, nor did Defendants file a motion to extend discovery or otherwise

demonstrate good cause for filing their motion outside of the discovery period. Therefore, the motion is **DENIED AS UNTIMELY**, except as specified below. *See Santifer v. Inergy Auto Sys., LLC*, No. 5:15-cv-11486, 2016 WL 4011268, at *2 (E.D. Mich. Jul. 27, 2016) (E.D. Mich. July 27, 2016) (requiring good cause for bringing a motion to compel after the close of discovery). Alternatively, as set forth in the prayer for relief:

- To the extent Defendants seek production of "all documents and information concerning her use of third-party AI tools in connection with this lawsuit, as requested in Defendants' discovery requests," this request is **DENIED**, as the information sought is not discoverable. *See* Fed. R. Civ. P. 26(b)(3)(A) ("Ordinarily, a party may not *discover* documents and tangible things that are prepared in anticipation of litigation or for trial by another *party* or its representative ...") (emphases added). Moreover, it is not relevant, or, even if marginally relevant, is not proportional. *See* Fed. R. Civ. P. 26(b)(1).[3]

[3] Notably, the Court previously confirmed that Defendants have no evidence of Plaintiff having violated the protective order by uploading documents marked confidential onto an AI platform. (ECF No. 93, PageID.1002.) The Court also reviewed pertinent and highlighted portions of Plaintiff's deposition transcript (ECF No. 80-2), which reveals an inordinate amount of questioning about Plaintiff's use of AI, but again, no suggestion that she uploaded prohibited items. Defendants' preoccupation with Plaintiff's use of AI needs to abate.

- To the extent Defendants ask the Court to "[o]verrule[] Plaintiff's attorney–client privilege and work-product objections to the AI materials," or alternatively, "if the Court sustains any privilege or protection as to any item, require Plaintiff, within seven days, to serve a Rule 26(b)(5)(A)-compliant privilege log[,]" the request is **DENIED**. Even if this information were discoverable, it is subject to protection under the work-product doctrine, which Plaintiff is permitted to assert. *See, e.g., Systemes v. Childress*, No. 09-10534, 2013 WL 12181774 (E.D. Mich. Nov. 22, 2013) (Hluchaniuk, M.J.) (order granting in part and denying in part motion to quash subpoenas); *Anderson v. Furst*, No. 2:17-12676, 2019 WL 2284731, *4 (E.D. Mich. May 29, 2019) (Patti, M.J.) ("Plaintiff, as a *pro se* litigant, has a right to assert work product protection over such material."); *see also* Fed. R. Civ. P. 26(b)(3). Moreover, to the extent Defendants argue that Plaintiff waived the work-product protection by using ChatGPT, the work-product waiver has to be a waiver *to an adversary* or in a way likely to get in an adversary's hand. *In re Columbia/HCA Healthcare Corp. Billing Pracs. Litig.*, 293 F.3d 289, 306 n.28 (6th Cir. 2002) (explaining differences in waiver of attorney-client privilege and work product protection); *Schanfield v. Sojitz Corp. of Am.*, 258 F.R.D. 211, 214 (S.D.N.Y. 2009) ("It is well-established that voluntary disclosure of confidential material to a third party waives any applicable attorney-client privilege."). *See also United States v. Am.*

Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980) ("while the mere showing of a voluntary disclosure to a third person will generally suffice to show waiver of the attorney-client privilege, it should not suffice in itself for waiver of the work product privilege."). And ChatGPT (and other generative AI programs) are *tools, not persons*, even if they may have administrators somewhere in the background. As Plaintiff noted in her response, Defendants' motion "asks the Court to compel Plaintiff's internal analysis and mental impressions—*i.e.*, her thought process—rather than any existing document or evidence, which is not discoverable as a matter of law. The motion seeks intrusive post-discovery production based on speculation about what might exist in Plaintiff's internal drafting process, untethered from Rule 26 relevance, disregarding the heightened protection afforded to opinion work product, and improperly attempting to manufacture a waiver where none exists. At its core, Defendants' request is a fishing expedition. . . ." (ECF No. 86, PageiD.917.) Additionally, the Court agrees with Plaintiff that the pursuit of this information is "a distraction from the merits of this case[,]" and that Defendants' theory, which is supported by no case law but only a Law360 article posing rhetorical questions,[4] "would nullify work-product protection in

[4] *See* ECF No.80, PageID.825-826. But as Plaintiff points out, "no cited case orders the production of what Defendants seek here: a litigant's internal mental impressions reformatted through software." (ECF No. 86, PageID.933.)

nearly every modern drafting environment, a result no court has endorsed." (*Id*., PageID.920, 930.)

- To the extent Defendants ask the Court to compel Plaintiff "to execute HIPAA-compliant medical authorizations for the medical and mental-health providers Plaintiff identified in her deposition[,]" this request is **GRANTED**. Notwithstanding the untimeliness of this motion, pursuant to the Court's broad authority under Fed. R. Civ. P. 1 and Fed. R. Civ. P. 16(a)(2) & (d), Plaintiff is required to produce signed HIPPA releases for Therapists Maria Yoo and Lemica Cox, and Dr. Shazia Qumar (*see* ECF No. 80, PageID.818; ECF No. 80-2, PageID.840 [pp. 23-24]) no later than **Thursday, February 12, 2026**. While Plaintiff claims that her prior attorney obtained these releases from her and would have given them to defense counsel, defense counsel represented that he did not receive them. Even a minimal amount of cooperation on Plaintiff's part could have avoided this portion of Defendants' motion to compel.

- To the extent Defendants seek an order requiring Plaintiff "to bear Defendants' reasonable expenses, including attorneys' fees, incurred in bringing this Motion, pursuant to Rule 37(a)(5)," the request was **WITHDRAWN** at the hearing.

(ECF No. 49, PageID.810-811.)

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In the end, both sides of this dispute seek to obtain each other's thought processes, while shielding their opponent from discovery of their own. The Court will uphold the protections afforded the thought processes and litigation strategies of both sides and will order production of neither.

IT IS SO ORDERED.[5]

Dated: February 10, 2026

Anthony P. Patti
UNITED STATES MAGISTRATE JUDGE

[5] The attention of the parties is drawn to Fed. R. Civ. P. 72(a), which provides a period of fourteen (14) days after being served with a copy of this order within which to file objections for consideration by the district judge under 28 U.S.C. § 636(b)(1).

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Robot Lawyers Don't Have Disciplinary Hearings—Real Lawyers Do: The Ethical Risks and Responses in Using Generative Artificial Intelligence

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ROBOT LAWYERS DON'T HAVE DISCIPLINARY HEARINGS—REAL LAWYERS DO: THE ETHICAL RISKS AND RESPONSES IN USING GENERATIVE ARTIFICIAL INTELLIGENCE

Hon. John G. Browning*

ABSTRACT

In the summer of 2023, the misuse of ChatGPT by two New York attorneys who filed briefs citing fabricated cases made national headlines. This cautionary tale quickly had company, as incidents of other lawyers whose use of artificial intelligence (AI) went horribly wrong filtered in from around the country, including incidents in Texas, Georgia, Colorado, and California. But it was not just errant legal research that was to blame: the cases involved everything from a faulty criminal habeas brief to flawed, mass-generated eviction pleadings by a landlord's law firm to a high-profile white collar criminal case, in which the convicted defendant blamed his lawyer's use of generative AI in writing his closing argument.

This Article, and its accompanying presentation, begins by discussing these cases as a way of illuminating the multiple areas of ethical risk presented by the use of generative AI. From breaches of the duty of technology competence and the duty of confidentiality, to the duties of supervision and use of independent professional

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judgment, a lawyer's use of generative AI can implicate multiple dimensions of ethical concern. Part of the problem, as this Article discusses, is that use of AI tools has spread at a faster pace than lawyers' grasp of the risks involved with the technology. For example, in the recent Wolters Kluwer Future Ready Lawyer Report*, while seventy-four percent of attorneys surveyed expect generative AI to be integrated into their practices within the next year, a significantly lower percentage of lawyers actually understand AI tools.*

This Article then looks at the responses of stakeholders in the legal profession to generative AI. For example, multiple state and national bar associations have appointed taskforces to study AI and make recommendations regarding its use. In addition, in states like Florida and California, ethics bodies have issued advisory opinions or recommendations on regulating use of AI, tackling such unanswered questions as whether a lawyer must obtain the client's informed consent in order to use generative AI in the client's representation. Attorneys are also having to confront AI policies adopted by various law firms and the legal malpractice carriers that insure them. A final response considered by this Article analyzes the extent to which measures such as these disclosure policies are a proportional reaction to the examples of lawyer misuse of generative AI, or whether they are an overreaction—a "solution in search of a problem."

With the landscape of potentially reportable generative AI applications constantly expanding to include most search engines and word-processing applications, one must ask the question: can the traditionally risk averse, technologically backward legal profession adapt? This Article, and its accompanying presentation, hopes to address this and other questions posed by attorney use of generative AI.

CONTENTS

INTRODUCTION

In his *2023 Year-End Report on the Federal Judiciary*, Chief Justice John Roberts devoted the majority of his discussion to artificial intelligence (AI) and its transformative potential for the legal profession and the judiciary.[1] However, he also sounded a note of warning, observing that "any use of AI requires caution and humility."[2] Chief Justice Roberts noted the instances in which generative AI applications have "hallucinat[ed]" nonexistent cases, as well as the "concerns about whether entering confidential information into an AI tool might compromise later attempts to invoke legal privileges."[3] Chief Justice Roberts concluded with a statement about how AI will impact not just lawyers, but also the judiciary, saying that the technology will affect "not only how judges go about doing their job, but also how they understand the role that AI plays in the cases that come before them."[4]

As the Chief Justice pointed out, the burgeoning use of AI platforms and tools such as ChatGPT has had a seismic effect on the legal profession. This creates both opportunities—as generative AI can free lawyers to focus on more complex, strategic work by automating many of their less sophisticated and more repetitive tasks—and risks. While the legal media breathlessly reports on the opportunities as firms regularly announce the adoption of a new AI tool or the latest "strategic partnership" with a technology vendor, the risks grab their share of headlines as well.[5]

As this Article illustrates, the use of generative AI in the legal profession poses multiple ethical concerns. Perhaps the best known is the risk that a lawyer will use generative AI to produce work product

1. CHIEF JUSTICE JOHN G. ROBERTS, JR., U.S. SUP. CT., 2023 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5–7 (2023), https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf [https://perma.cc/CL8V-LB7J].

2. *Id.* at 5.

3. *Id.* at 6.

4. *Id.*

5. *E.g.*, Pranshu Verma & Will Oremus, *These Lawyers Used ChatGPT to Save Time. They Got Fired and Fined.*, WASH. POST, https://www.washingtonpost.com/technology/2023/11/16/chatgpt-lawyer-fired-ai/ [https://perma.cc/TCU3-QLAW] (Nov. 16, 2023, 10:39 AM).

they treat as a final draft, without confirming the accuracy of the information contained therein or without applying their own independent professional judgment. Multiple rules of professional conduct are jeopardized by such behavior: the duty to provide competent representation is arguably the biggest in light of the fact that forty states have adopted a duty of tech competence, requiring lawyers to be cognizant of the benefits and risks of relevant technology.[6] But the duty of confidentiality, the duty to supervise, and the duty of candor to the tribunal are other ethical obligations implicated by such use of generative AI.

After discussing examples of attorney misuse of generative AI, this Article moves on to focus on the various responses to this misuse by stakeholders in the legal profession. From bar associations creating taskforces to study AI and recommend best practices,[7] to ethics authorities issuing opinions to provide practical guidance,[8] to courts prescribing a dizzying array of standing orders and mandatory disclosures of the use of generative AI,[9] this Article discusses each of these reactions and their varying degrees of effectiveness.

According to Wolters Kluwer's 2023 *Future Ready Lawyer Report*, seventy-three percent of responding lawyers expect to integrate generative AI into their legal work in the next twelve months.[10] That is not an astonishing statistic given the rapid rate of adoption of generative AI by the legal profession since ChatGPT was introduced in the fall of 2022.[11] What *is* shocking, in light of the multiple instances

6. Bob Ambrogi, *Another State Adopts Duty of Technology Competence for Lawyers, Bringing Total to 40*, LAWSITES (Mar. 24, 2022), https://www.lawnext.com/2022/03/another-state-adopts-duty-of-technology-competence-for-lawyers-bringing-total-to-40.html [https://perma.cc/2BTJ-AUMB]; *see also* Hon. John G. Browning, *Real World Ethics in an Artificial Intelligence World*, 49 N. KY. L. REV. 155, 158–59 (2022).

7. *See infra* Section II.B.2.

8. *See infra* Section II.B.3.

9. *See infra* Section II.A.

10. WOLTERS KLUWER, 2023 FUTURE READY LAWYER SURVEY REPORT: EMBRACING INNOVATION, ADAPTING TO CHANGE 2 (2023), https://www.wolterskluwer.com/en/know/future-ready-lawyer-2023#download [https://perma.cc/9ZN2-GSTK].

11. LEXISNEXIS, INTERNATIONAL LEGAL GENERATIVE AI REPORT: DETAILED SURVEY FINDINGS 3 (2023), https://www.lexisnexis.com/pdf/lexisplus/international-legal-generative-ai-report.pdf [https://perma.cc/2FXW-RYKS].

of misuse of AI nationwide in 2023, is that an equal percent of respondents to the same survey—seventy-three percent—claim to understand AI and how it can be applied to their work.[12] Compare this to a recent study conducted by the National Judicial College, in which seventy-six percent of judges surveyed admitted they had never tried generative AI; another seven percent of judges had tried it and had a negative experience, usually relating to hallucinated cases and citations.[13]

Clearly, a substantial percentage of lawyers (not to mention the judges before whom they practice) are either not yet using generative AI or are using it without a full understanding of the technology's capabilities and limitations.[14] As this Article discusses, the lawyers who wind up facing sanctions or disciplinary action for their misuse of generative AI not only fail in their grasp of the AI tools themselves, but also fail to heed some of the most basic ethical obligations that attorneys have: the duty to provide competent representation, the duty of confidentiality, the duty to supervise (both lawyer and nonlawyer assistance), the duty of candor to the tribunal, and the duty to provide independent professional judgment.[15] The "robot lawyers" that some fear are part of technology's inexorable path forward will swear no oaths and will not be subject to any disciplinary proceedings. Real lawyers, however, do take a very real oath and are very much subject to discipline for their professional misconduct. Accordingly, an understanding of the mistakes that attorneys make in using generative AI and how stakeholders in the legal profession have elected to

12. WOLTERS KLUWER, *supra* note 10, at 4.

13. Ed Cohen, *Most Judges Haven't Tried ChatGPT, and They Aren't Impressed*, NAT'L JUD. COLL. (July 21, 2023), https://www.judges.org/news-and-info/most-judges-havent-tried-chatgpt-and-they-arent-impressed/#:~:text=Of%20the%20332%20judges%20who,technology%20isn't%20reliable%20enough [https://perma.cc/79Z8-LYR7].

14. *Id.*; WOLTERS KLUWER, *supra* note 10, at 3.

15. Julia Brickell, Jeanna Matthews, Denia Psarrou & Shelley Podolny, *Tech & Telecom, Professional Perspective - AI, Pursuit of Justice & Questions Lawyers Should Ask*, BLOOMBERG L. (Apr. 2022), https://www.bloomberglaw.com/external/document/X3T91GR8000000/tech-telecom-professional-perspective-ai-pursuit-of-justice-ques [https://perma.cc/CKP7-CHWK].

respond to these risks is critical to mapping a path forward to the future of our profession.

I. BEWARE – HALLUCINATIONS AHEAD: LAWYERS MISUSING GENERATIVE AI

A. Mata v. Avianca, Inc. *and the Cases That Never Were*

For a case that wound up generating so much attention, *Mata v. Avianca, Inc.* began quietly enough. Plaintiff Roberto Mata alleged that a metal serving cart injured him while he was a passenger on an Avianca flight from El Salvador to JFK Airport in New York.[16] His attorney, Steven A. Schwartz of Levidow, Levidow & Oberman, P.C., sued Avianca in state court, and the airline removed the case to federal court.[17] Schwartz continued to work on the case; however, because Schwartz was not admitted to practice in the Southern District of New York, Peter LoDuca of the same firm appeared as counsel of record and signed off on Schwartz's work—without substantively checking it.[18] When Avianca filed a motion to dismiss, Schwartz (through LoDuca) filed an opposition, citing a number of cases.[19]

This is where the fun began. Counsel for Avianca replied, stating it could not find most of the cited cases, while those that could be located appeared not to support the proposition for which they were cited.[20] The court responded by ordering LoDuca to file an affidavit citing the questionable cases.[21] Schwartz prepared the affidavit, which LoDuca signed, with excerpts from some of the "cases" attached because he could not locate the full cases.[22] The court held a hearing on sanctions.[23]

16. Mata v. Avianca, Inc., No. 22-cv-1461 (PKC), 2023 WL 4114965, at *2 (S.D.N.Y. June 22, 2023).
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.* at *3.
21. *Id.*
22. *Mata*, 2023 WL 4114965, at *4.
23. *Id.* at *3.

At the hearing, Schwarz and LoDuca admitted that a "hallucinating" ChatGPT, a resource that they turned to due to limited legal resources, fabricated the decisions.[24] The court had ordered LoDuca to annex copies of the "mystery" cases—all of which were nonexistent.[25] ChatGPT had provided seemingly convincing details about the cases, including docket numbers, federal reporter citations, and even panel makeups.[26] But there were glaring signs that Schwartz's "research" on ChatGPT was dubious, such as the involvement of Judge Patrick Higginbotham, a Fifth Circuit jurist, on an Eleventh Circuit "decision," or legal "reasoning" that the court called "gibberish."[27]

U.S. District Court Judge Kevin Castel took issue with not only the submission of fake cases, but also with counsels' attempts to cover up their bad faith.[28] At one point, Schwartz had claimed that he only used ChatGPT to "supplement" his research, only to later confess that using ChatGPT was his sole "research."[29] As the court pointed out: "Respondents advocated for the fake cases and legal arguments contained in the Affirmation in Opposition after being informed by their adversary's submission that their citations were non-existent and could not be found."[30] Pointing out that "existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings," Judge Castel held that the two plaintiff's attorneys "abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool

24. *Id.*

25. *Id.* at *3. The cited cases are as follows:
Varghese v. China Southern Airlines Co., Ltd., 925 F.3d 1339 (11th Cir. 2019); Shaboon v. Egyptair, 2013 IL App. (1st) 111279-U (Ill. App. Ct. 2013); Peterson v. Iran Air, 905 F. Supp. 2d 121 (D.D.C. 2012); Martinez v. Delta Airlines, Inc., 2019 WL 4639462 (Tex. App. Sept. 25, 2019); Estate of Durden v. KLM Royal Dutch Airlines, 2017 WL 2418825 (Ga. Ct. App. June 5, 2017); Ehrlich v. American Airlines, Inc., 360 N.J. Super. 360 (App. Div. 2003); Miller v. United Airlines, Inc., 174 F.3d 366, 371-72 (2d Cir. 1999); and In re Air Crash Disaster Near New Orleans, LA, 821 F.2d 1147, 1165 (5th Cir. 1987).

Id.

26. *Id.* at *6–8.

27. *Id.* at *5 & n.7.

28. *Mata*, 2023 WL 4114965, at *9.

29. *Id.*

30. *Id.* at *15.

ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question."[31]

Ultimately, the court sanctioned each lawyer $5,000, ordered them to complete continuing legal education on technology competence and AI, ordered them to send a copy of the judge's order to their client, and ordered them to write letters of apology to each of the judges falsely identified by ChatGPT as having authored the fabricated cases.[32] The sanction was rather light, considering the embarrassing public attention that had already had a devastating effect on Schwartz's and LoDuca's professional reputations.

B. Ex Parte Lee

While *Mata* was the first and arguably most egregious case of attorney misuse of generative AI, it was far from the last. Less than a month after the New York sanctions order, a Texas appellate court was forced to confront another instance of fabricated case authority and gibberish. *Ex parte Lee* was a pre-trial habeas corpus case in the Texas Court of Appeals.[33] The court denied review based on the appellant's inadequate briefing.[34] The court noted that the "Argument" section of the appellant's brief cited only five cases, including three published "cases" citing to the *Southwest Reporter*.[35] There was one slight problem, however—according to the court, "[n]one of the three published cases actually exist in the Southwest Reporter."[36] Each "citation" provided a jump-cite to the text of other cases that had nothing to do with the propositions cited by the appellant—two of the cases were from Missouri, instead of Texas.[37] The court noted that even the Texas cases with the same names as those cited had nothing to do with the arguments in the brief.[38]

31. *Id.* at *1.
32. *Id.* at *16–17.
33. *Ex parte* Lee, 673 S.W.3d 755, 756 (Tex. App. 2023).
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*

Calling the briefing "illogical" and citing to both *Mata* and Judge Brantley Starr's certification requirement in the Northern District of Texas, the court concluded that "it appears that at least the 'Argument' portion of the brief may have been prepared by artificial intelligence (AI)."[39] Because the court had addressed the issue raised on appeal, it declined to report the attorney to the State Bar of Texas for disciplinary action and to issue a show cause order, like the New York federal court had done.[40]

C. People v. Crabill

It would not take long for ChatGPT hallucinations to undermine another careless attorney. In June 2023, media outlets shared the story of Zachariah Crabill, a young Colorado Springs attorney.[41] Crabill was two years out of law school, and in April 2023, a client hired him to prepare a motion to set aside the judgment in a civil case.[42] According to Crabill, it was the first such motion he had ever researched and drafted all by himself; as he later characterized it: "I just had no idea what to do and no idea who to turn to."[43] So he turned to ChatGPT, which spat out "dozens" of cases that Crabill used in the brief he filed with the court.[44]

After filing the motion and brief, Crabill realized the day of the hearing that all of the case citations from ChatGPT were "garbage" and that he could not find them on LexisNexis.[45] But Crabill compounded his mistake of not verifying the citations earlier by failing to alert the court to his deficiencies and by failing to withdraw the motion. When the judge expressed concern that he could not find any

39. *Ex parte Lee*, 673 S.W.3d at 757 n.2.

40. *Id.*

41. *See, e.g.*, Quinn Ritzdorf, *Colorado Springs Attorney Says ChatGPT Created Fake Cases He Cited in Court Documents*, KRDO (June 13, 2023, 5:30 PM), https://krdo.com/news/2023/06/13/colorado-springs-attorney-says-chatgpt-created-fake-cases-he-cited-in-court-documents/ [https://perma.cc/8CNC-QFN8].

42. *Id.*; Verma & Oremus, *supra* note 5.

43. Verma & Oremus, *supra* note 5; Ritzdorf, *supra* note 41.

44. Ritzdorf, *supra* note 41.

45. *Id.*

of the cases cited, Crabill made his next mistake—he blamed an intern.[46] The court denied the motion and referred Crabill for disciplinary action; six days later, Crabill filed an affidavit confessing that he had used ChatGPT in drafting the motion.[47]

In July, Crabill was terminated from his law firm.[48] On November 22, 2023, Crabill was suspended from practicing law for one year and one day for acts of professional misconduct that included violations of Colorado Rule of Professional Conduct 1.1 (competent representation), Rule 1.3 (diligent representation), Rule 3.3(a)(1) (lack of candor to the tribunal), and Rule 8.4(c) (engaging in conduct involving dishonesty or deceit).[49] Crabill's misconduct is a cautionary tale, but as with other instances involving attorney use of generative AI, it is inaccurate to describe this as a failure of technology; it is a failure of character. ChatGPT did not keep Crabill from fulfilling his ethical obligations to review the "research," to be truthful to the judge, and to be diligent in his representation of his clients.

D. Dennis P. Block Law Offices and ChatGPT

In April 2023, Los Angeles housing attorney Lydia Nicholson felt that something was off about the brief they had received from opposing counsel, Dennis Block, in an eviction case.[50] Block was an experienced lawyer in the unlawful detainer arena, as was Nicholson, but the cases cited by Block were unfamiliar to Nicholson.[51] After some research, Nicholson realized that many of the cases were fake and likely the

46. People v. Crabill, No. 23PDJ067, 2023 WL 8111898, at *1 (Off. Presiding Disciplinary J. Sup. Ct. Colo. Nov. 22, 2023).

47. Ritzdorf, *supra* note 41; *Crabill*, 2023 WL 8111898, at *1.

48. Verma & Oremus, *supra* note 5.

49. *Crabill*, 2023 WL 8111898, at *1; Ben Warwick, *Colorado Lawyer Suspended for Using AI Platform to Draft Legal Motion*, CBS NEWS COLO. (Nov. 22, 2023, 4:05 PM), https://www.cbsnews.com/colorado/news/colorado-lawyer-artificial-intelligence-suspension/ [https://perma.cc/398W-Y5Y9].

50. Verma & Oremus, *supra* note 5.

51. *Id.*; David Wagner, *This Prolific LA Eviction Law Firm Was Caught Faking Cases in Court. Did They Misuse AI?*, LAIST (Oct. 12, 2023, 5:00 AM), https://laist.com/news/housing-homelessness/dennis-block-chatgpt-artificial-intelligence-ai-eviction-court-los-angeles-lawyer-sanction-housing-tenant-landlord [https://perma.cc/PRE2-N2ZA].

handiwork of a ChatGPT program's hallucinations.[52] Nicholson filed a motion pointing out the fabricated cases.[53]

The judge reviewing this matter, Los Angeles Superior Court Judge Ian Fusselman, made an independent inquiry, which confirmed Nicholson's suspicions.[54] The cases that were cited, like *51 Scott Street, LLC v. Sheehan* and *Cole v. Stevenson*, were fictitious.[55] The judge sanctioned Block $999, calling the court filing "rife with inaccurate and false statements."[56] For its part, Block's firm blamed the wildly inaccurate brief on a first-year lawyer who had relied on "online research," and who had since left the firm.[57]

It would be all too easy, given the youth and inexperience of the lawyers involved in the Crabill and Block cases, to blame the generative AI misuse on these factors, or the naiveté and misplaced reliance on technology by two digital natives. But this does not excuse the abdication—in both cases—of an attorney's ethical obligation to supervise those junior to her. It also does not explain the ethical lapses by far more experienced attorneys in *Mata* and *Lee* (Schwartz, for example, had been practicing for more than twenty-five years[58]). And as we shall see in our final two examples of generative AI misuse, both involve seasoned attorneys who were all too quick to trust in generative AI.

E. United States v. Michael Cohen

The former attorney to former President Donald Trump, Michael Cohen, was engaged in a years-long saga involving hush money payments made to two women during Trump's first presidential

52. Verma & Oremus, *supra* note 5.
53. *Id.*
54. *Id.*; Wagner, *supra* note 51.
55. Wagner, *supra* note 51.
56. *Id.*
57. *Id.*
58. Benjamin Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT*, N.Y. TIMES (May 27, 2023), https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html.

campaign.[59] After being convicted for his role, Cohen served time in prison but received a shortened sentence and has been on supervised release since November 2021.[60] His legal team, led until recently by attorney David M. Schwartz, has been engaged in seeking an early termination of that supervised release.[61] However, recent developments may make that effort more difficult.

On November 29, 2023, Schwartz filed his motion for early release, citing at least three cases in support of his argument.[62] Unfortunately for Cohen, it appeared that those cases do not actually exist.[63] An attorney who was added to Cohen's legal team after Schwartz's filing, Danya Perry, discovered the fabricated cases and alerted U.S. District Judge Jesse Furman.[64] In a statement, Perry said: "In conducting my own research in support of Mr. Cohen's motion, I was unable to verify the case law that had been submitted by previous counsel in his initial papers. . . . Consistent with my ethical obligation of candor to the Court, I advised Judge Furman of this issue."[65]

Judge Furman responded by issuing an order to show cause, directing Schwartz to provide copies of the three cited decisions by December 19, 2023, or if unable to provide copies of the cases, to otherwise respond as to why he should not be sanctioned.[66] But then the matter took another interesting twist. Schwartz, citing attorney-client privilege, asked to file his response under seal, and also

59. Press Release, U.S. Att'y's Off., S.D.N.Y., Michael Cohen Pleads Guilty in Manhattan Federal Court to Eight Counts, Including Criminal Tax Evasion and Campaign Finance Violations (Aug. 21, 2018), https://www.justice.gov/usao-sdny/pr/michael-cohen-pleads-guilty-manhattan-federal-court-eight-counts-including-criminal-tax [https://perma.cc/M2K5-WKPX].

60. Andrew Zhang, *Michael Cohen's Lawyer in Hot Water After Citing Court Cases That Don't Exist*, POLITICO (Dec. 12, 2023, 7:42 PM), https://www.politico.com/news/2023/12/12/michael-cohen-court-cases-00131435 [https://perma.cc/RF4S-TG8A].

61. *Id.*

62. Order to Show Cause at 1, United States v. Cohen, No. 1:18-cr-00602-JMF (S.D.N.Y. Dec. 12, 2023) [hereinafter Order to Show Cause]. The cases cited in the motion are as follows: "*United States v. Figueroa-Florez*, 64 F. 4th 223 (2d Cir. 2022); *United States v. Ortiz* (No. 21-3391), 2022 WL 4424741 (2d Cir. Oct. 11, 2022); and *United States v. Amato*, 2022 WL 1669877 (2d Cir. May 10, 2022)." *Id.*

63. *Id.*

64. Zhang, *supra* note 60.

65. *Id.*

66. Order to Show Cause, *supra* note 62, at 2.

sought more time to respond.[67] Both requests were granted.[68] In court papers unsealed on December 29, 2023, Cohen's sworn declaration revealed that he had "mistakenly" given his attorney fake case citations generated by Google Bard (now Google Gemini), and that Schwartz dropped the cases "wholesale into his submission without even confirming they existed."[69] According to Cohen, who was disbarred nearly five years ago, he had "not kept up with emerging trends (and related risks) in legal technology and did not realize that Google Bard was a generative text service that, like ChatGPT, could show citations and descriptions that looked real but actually were not."[70]

F. United States v. Pras Michel

In May 2019, Pras Michel, a rapper and former member of the musical group the Fugees, was indicted in connection with a conspiracy to illegally funnel contributions to the 2012 reelection campaign of former President Barack Obama.[71] He was convicted in the spring of 2023, after a high-profile trial.[72] In October 2023, Michel filed a motion for new trial, claiming (among other allegations) ineffective assistance of counsel because his prior attorney, David Kenner, had bungled the defense by using generative AI to prepare his closing argument.[73] Primarily, Michel asserted the AI tool his former

67. Order Granting Temporary Motion to Seal at 1–2, United States v. Cohen, No. 1:18-cr-00602-JMF (S.D.N.Y. Dec. 18, 2023); Docket, United States v. Cohen, No. 1:18-cr-00602 (S.D.N.Y. Mar. 20, 2024).

68. Order Granting Temporary Motion to Seal at 1–2, United States v. Cohen, No. 1:18-cr-00602-JMF (S.D.N.Y. Dec. 18, 2023); Docket, United States v. Cohen, No. 1:18-cr-00602 (S.D.N.Y. Mar. 20, 2024).

69. Nate Raymond, *Ex-Trump Fixer Michael Cohen Says AI Created Fake Cases in Court Filing*, REUTERS, https://www.reuters.com/legal/ex-trump-fixer-michael-cohen-says-ai-created-fake-cases-court-filing-2023-12-29/ [https://perma.cc/RJE6-BJ26] (Dec. 29, 2023, 5:46 PM).

70. *Id.*

71. Eduardo Medina, *Fugees Rapper Pras Michel Found Guilty in Illegal Foreign Influence Scheme*, N.Y. TIMES, https://www.nytimes.com/2023/04/26/us/pras-michel-campaign-finance-convicted.html (Apr. 28, 2023).

72. Alison Frankel, *Convicted Fugees Rapper Says Ex-Lawyer Bungled Defense with AI Closing Argument*, REUTERS, https://www.reuters.com/legal/transactional/convicted-fugees-rapper-says-ex-lawyer-bungled-defense-with-ai-closing-argument-2023-10-17/ [https://perma.cc/2R2C-88PL] (Oct. 17, 2023, 12:03 PM).

73. *Id.*; Defendant Prakazrel Michel's Motion for New Trial at 20, United States v. Michel, No. 1:19-cr-00148-CKK (D.D.C. Oct. 16, 2023) [hereinafter Defendant Prakazrel Michel's Motion for New Trial].

attorney used was experimental; it misattributed a Puff Daddy song and other song lyrics to the Fugees, conflated other factual schemes, and failed to highlight key weaknesses in the government's case.[74] Even more shockingly, the motion for new trial asserted that attorney Kenner had an "undisclosed financial stake" in EyeLevel.AI, the AI company whose tool he used.[75]

Kenner was a noted "celebrity lawyer," but, according to Michel's current counsel, "is not an expert in complex white-collar cases or lobbying regulations."[76] Michel's new lawyer contends that the AI-assisted tool made frivolous arguments, "misapprehended the required elements" of the case, and was otherwise "*damaging* to the defense."[77] The motion also alleges that Kenner raved about his use of AI for the case, saying, "The system turned hours or days of work into seconds," and "This is a look into the future of how cases will be conducted."[78] EyeLevel's website even boasted about its involvement in the case, touting it "the first use of generative AI in a federal trial."[79]

There has been no ruling yet on the motion for new trial. EyeLevel denied the accusation that Kenner has a financial stake in the company and was quick to defend the role it played in the trial.[80] In an interview, EyeLevel co-founder Neil Katz confirmed that its AI did a first draft

74. Defendant Prakazrel Michel's Motion for New Trial, *supra* note 73, at 22 & n.11.

75. *Id.* at 22 & n.10.

76. Michael Kunzelman & Lindsay Whitehurst, *Prominent Celebrity Lawyer Pleads Guilty to Leaking Documents to Reporters in Fugees Rapper's Case*, ASSOCIATED PRESS, https://apnews.com/article/fugees-lawyer-sentenced-pras-michel-contempt-case-b06cc0cab18fc45866c882a59fe66db6 [https://perma.cc/PES4-9C8R] (Jan. 26, 2024, 5:23 PM); Frankel, *supra* note 72.

77. Defendant Prakazrel Michel's Motion for New Trial, *supra* note 73, at 22.

78. *Id.* at 2; *First Use of AI in Federal Trial: EyeLevel's Litigation Assist Aids Defense in Pras Michel Fraud Case*, EYELEVEL.AI (May 10, 2023) [hereinafter *First Use of AI in Federal Trial*], https://www.eyelevel.ai/post/first-use-of-ai-in-federal-trial#:~:text=WASHINGTON%2C%20D.C.%2C%20May%2010%20%2D,trial%20for%20international%20fraud%20charges [https://perma.cc/H9CW-7FS9].

79. *First Use of AI in Federal Trial*, *supra* note 78.

80. Stephanie Wilkins, *EyeLevel.ai Co-Founder Defends Tech's Use in Pras Michel Trial, Calls Allegations a 'Creative Act of Fiction,'* LAW.COM (Nov. 8, 2023, 8:00 AM), https://www.law.com/legaltechnews/2023/11/08/eyelevel-ai-co-founder-defends-use-in-pras-michel-trial-calls-allegations-a-creative-act-of-fiction/#:~:text=Q%26A-,EyeLevel.ai%20Co%2DFounder%20Defends%20Tech's%20Use%20in%20Pras%20Michel,for%20almost%20two%20years%20now [https://perma.cc/TTP9-E5CX].

of closing arguments and helped give a "prediction of the opponent's closing arguments."[81] However, Katz stressed that "this does not replace a lawyer. We view our technology as an AI that helps human lawyers make human decisions. And that's what happened here."[82]

Michel's new lawyer argued that "the AI program failed Kenner, and Kenner failed Michel. The closing argument was deficient, unhelpful, and a missed opportunity that prejudiced the defense."[83] Whether or not it fabricated citations or arguments as in other cases involving use of generative AI, the use of the AI tool in Michel's case raises interesting ethical questions. First, to what degree was Michel, the client, informed of and in agreement with the use of generative AI? Second, while we have witnessed multiple examples of judges sanctioning lawyers, referring them for disciplinary action, or mandating that their use of AI be disclosed, what ethical obligation, if any, is there to inform the trial judge of one's use of generative AI in closing argument? And finally, while we have seen misuse of generative AI result in sanctions or disciplinary charges, does a case like Michel's sound a warning to lawyers that using generative AI improperly may constitute a breach of the attorney's standard of care and lead to a legal malpractice claim or lawsuit?

II. RESPONSES TO ATTORNEY MISUSE OF GENERATIVE AI

A. Judicial Responses

1. U.S. District Court for the Northern District of Texas

Shortly after the New York federal court issued its show cause order in *Mata*, a U.S. District Court judge in Texas issued the first standing

81. *Id.*
82. *Id.*
83. Defendant Prakazrel Michel's Motion for New Trial, *supra* note 73, at 24.

orders in the country regarding attorney use of generative AI.[84] Judge Brantley Starr of the Northern District of Texas (Dallas Division) updated his individual practice rules to include a "Mandatory Certification Regarding Generative Artificial Intelligence."[85] This rule requires both attorneys and pro se litigants to file a certificate "attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being."[86] Judge Starr's rule goes on to explain why it is necessary—because "[t]hese platforms in their current states are prone to hallucinations and bias."[87] As to the bias aspect, the rule points out that while attorneys are subject to an oath to faithfully uphold the law and set aside personal prejudices, "generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath."[88] Judge Starr's order also spells out consequences for failure to comply:

> Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from a party who fails to file a certificate on the docket attesting that they have read the Court's judge-specific requirements and understand that they will be held responsible under Rule 11 for the contents of any filing that

84. Mata v. Avianca, Inc., No. 22-cv-1461 (PKC), 2023 WL 4114965, at *1 (S.D.N.Y. June 22, 2023); Sara Merken, *Wary Courts Confront AI Pitfalls as 2024 Promises More Disruption*, REUTERS, https://www.reuters.com/legal/transactional/wary-courts-confront-ai-pitfalls-2024-promises-2023-12-27/ [https://perma.cc/6SU9-8E2V] (Dec. 28, 2023, 12:19 PM); Shannon Capone Kirk, Emily A. Cobb & Amy Jane Longo, *Judges Guide Attorneys on AI Pitfalls with Standing Orders*, ROPES & GRAY (Aug. 2, 2023), https://www.ropesgray.com/en/insights/alerts/2023/08/judges-guide-attorneys-on-ai-pitfalls-with-standing-orders [https://perma.cc/ZH9R-ENGR].

85. *Judge Brantley Starr – Judge Specific Requirements: Mandatory Certification Regarding Generative Artificial Intelligence*, U.S. DIST. CT. N. DIST. TEX., https://www.txnd.uscourts.gov/judge/judge-brantley-starr [https://perma.cc/C5XR-89LP].

86. *Id.*

87. *Id.*

88. *Id.*

> they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing.[89]

Attorneys and scholars have characterized Judge Starr's order, and a number of those that followed suit, as a solution in search of a problem, pointing out that under Rule 11 of the *Federal Rules of Civil Procedure*, an attorney is already subject to sanctions for filing pleadings that are factually or legally inaccurate.[90] This is valid criticism, but errant lawyers are not the only concerns of federal judges. Since the advent of ChatGPT, a number of cases involving pro se litigants have featured the use of generative AI by nonlawyers who filed briefs or pleadings citing to nonexistent cases. In a recent Medicaid disability case, for example, the court noted that "[m]ost of the cases [cited by the plaintiff] appear to be nonexistent."[91] Similarly, the Fifth Circuit recently dismissed the appeal of a § 1983 civil rights action by a pro se plaintiff in part due to the plaintiff "citing nonexistent cases."[92] In addition, in a pro se civil rights lawsuit, a federal court in New Mexico did not dismiss the plaintiff's case, but took exception with her citing to "fake or nonexistent opinions," and sternly warned the plaintiff that "[a]ny future filings with citations to nonexistent cases may result in sanctions such as the pleading being stricken, filing restrictions imposed, or the case being dismissed."[93]

2. Other Federal Courts

Judge Starr's order was soon followed by other federal judges around the country. Judge Stephen Alexander Vaden of the U.S. Court of International Trade issued an "Order on Artificial Intelligence" as

89. *Id.*

90. *See, e.g.*, Merken, *supra* note 84.

91. Taranov *ex rel.* Taranov v. Area Agency of Greater Nashua, No. 21-cv-995-PB, slip op. at 10 n.9 (D.N.H. Oct. 16, 2023).

92. Esquivel v. Kendrick, No. 22-50979, 2023 U.S. App. LEXIS 22839, at *1–2, 8 (5th Cir. Aug. 29, 2023) (per curiam).

93. Morgan v. Cmty. Against Violence, No. 23-cv-353-WPJ/JMR, slip op. at *8 (D.N.M. Oct. 23, 2023).

well.[94] Judge Vaden's order begins with his concerns about maintaining the confidentiality of information. It states: "Although the owners of generative artificial intelligence programs may make representations that they do not retain information supplied by users, their programs 'learn' from every user conversation and cannot distinguish which conversations may contain confidential information."[95] Noting that "generative artificial intelligence programs challenge the Court's ability to protect confidential and business proprietary information from access by unauthorized parties," Judge Vaden ordered that any submission containing text generated with the assistance of a generative AI program like ChatGPT or Google Bard would need to be accompanied by two things.[96] The first was "[a] disclosure notice that identifies the program used and the specific portions of text that have been so drafted."[97] The second was "[a] certification that the use of [generative AI] has not resulted in the disclosure of any confidential or business proprietary information to any unauthorized party."[98] Like Judge Starr, Judge Vaden does not prohibit AI use outright. Moreover, his concerns about confidentiality may be heightened in some cases and lessened in others.

Judge Michael Baylson of the U.S. District Court for the Eastern District of Pennsylvania issued another standing order on generative AI on June 6, 2023.[99] Like Judge Starr's and Judge Vaden's orders, it requires disclosures.[100] Specifically, any attorney or pro se litigant who has used generative AI in any filing "MUST, in a clear and plain factual statement, disclose that AI has been used in any way in the

94. Hon. Stephen Alexander Vaden, United States Court of International Trade, Order on Artificial Intelligence 1 (June 8, 2023) [hereinafter Court of International Trade AI Order], https://www.cit.uscourts.gov/sites/cit/files/Order%20on%20Artificial%20Intelligence.pdf [https://perma.cc/DZ2N-JTJC].

95. *Id.* at 2.

96. *Id.*

97. *Id.*

98. *Id.*

99. J. Michael M. Baylson, United States District Court for the Eastern District of Pennsylvania, Standing Order Re: Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson (June 6, 2023), https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf [https://perma.cc/37VL-A97L].

100. *Id.*

preparation of the filing, and CERTIFY, that each and every citation to the law or the record in the paper, has been verified as accurate."[101]

Magistrate Judge Gabriel Fuentes of the Northern District of Illinois takes a similar approach. In an order that cites everything from *Mata v. Avianca, Inc.* and Judge Starr's order to the movie *2001: A Space Odyssey*, Judge Fuentes states that he will only require a certification when a party actually uses generative AI (unlike Judge Starr).[102] The order states that "[a]ny party using any generative AI tool to conduct legal research or to draft documents for filing with the Court must disclose in the filing that AI was used, with the disclosure including the specific AI tool and the manner in which it was used."[103] Judge Fuentes goes into some detail concerning his reasoning for a specific AI-related rule, but unlike Judge Vaden's confidentiality rationale, Judge Fuentes ties it to the principle of candor to the tribunal:

> Just as the Court did before the advent of AI as a tool for legal research and drafting, the Court will continue to presume that the Rule 11 certification is a representation by filers, as living, breathing, thinking human beings, that they themselves have read and analyzed all cited authorities to ensure that such authorities actually exist and that the filings comply with Rule 11(b)(2).[104]

Other standing orders followed, most of which copied the features of a disclosure followed by a certification of some kind. Judge Scott Palk of the U.S. District Court for the Western District of Oklahoma issued an order requiring that any party who uses generative AI in the preparation of any filing with the court "must disclose in the document

101. *Id.*

102. Mag. J. Gabriel A. Fuentes, United States District Court for the Northern District of Illinois, Standing Order for Civil Cases Before Magistrate Judge Fuentes, at 2 (May 31, 2023), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20rev%27d%205-31-23%20(002).pdf [https://perma.cc/5PZ4-Z42P].

103. *Id.*

104. *Id.*

that AI was used and the specific AI tool that was used," along with certification "that the person has checked the accuracy of any portion of the document drafted by generative AI, including all citations and legal authority."[105] Judge Arun Subramanian of the Southern District of New York does not require a disclosure or certification, but he admonishes attorneys and self-represented litigants:

> Use of ChatGPT or other such tools is not prohibited, but counsel must at all times personally confirm for themselves the accuracy of any research conducted by these means. At all times, counsel—and specifically designated Lead Trial Counsel—bears responsibility for any filings made by the party that counsel represents.[106]

New Jersey federal Judge Evelyn Padin, on the other hand, requires both a disclosure and a certification by those whose filings reflect the use of generative AI.[107] The attorney or litigant must identify the generative AI program used and the portion of the filing drafted by generative AI, and "certif[y] that the GAI work product was diligently reviewed by a human being for accuracy and applicability."[108] Contrast this with the directive given by Judge Donald Molloy of the U.S. District Court of Montana: "Use of artificial intelligence automated drafting programs, such as Chat GPT, is prohibited."[109]

105. J. Scott L. Palk, Chambers of United States District Judge, Disclosure and Certification Requirements – Generative Artificial Intelligence, https://www.okwd.uscourts.gov/wp-content/uploads/AI_Guidelines_JudgePalk.pdf [https://perma.cc/VYZ8-XNGH].

106. J. Arun Subramanian, United States District Court Southern District of New York, Individual Practices in Civil Cases, at 7 (2023), https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AS%20Subramanian%20Civil%20Individual%20Practices.pdf [https://perma.cc/SNN5-N6HR].

107. JUDGE EVELYN PADIN'S GENERAL PRETRIAL AND TRIAL PROCEDURES 2 (2023), https://www.njd.uscourts.gov/sites/njd/files/EPProcedures.pdf [https://perma.cc/M6RY-FVGP].

108. *Id.*

109. Belenzon v. Paws Up Ranch, LLC, No. CV 23-69-M-DWM, 2023 U.S. Dist. LEXIS 123020, at *1 (D. Mont. June 22, 2023).

Judge Michael Newman of the Southern District of Ohio similarly implemented an outright ban of the use of generative AI.[110] His rule states that "[n]o attorney for a party, or a *pro se* party, may use Artificial Intelligence ('AI') in the preparation of any filing submitted to the Court" and warns of the sanctions that might be imposed.[111] The provision clarifies that the AI ban is not intended to apply to "information gathered from legal search engines, such as Westlaw or LexisNexis, or Internet search engines, such as Google or Bing."[112] It also reminds attorneys "to immediately inform the Court if they discover the use of AI in any document filed in their case."[113]

Judge Stephen Clark of the U.S. District Court for the Eastern District of Missouri also imposed a blanket ban on the use of generative AI; however, his ban appears in a section of his personal rules directed to self-represented litigants.[114] His rule bluntly states: "No portion of any pleading, written motion, or other paper may be drafted by any form of generative artificial intelligence."[115] While this admonishment appears within a section directed at self-represented litigants, the provision continues to remind both these litigants and attorneys that they are responsible for the content of their filings.[116]

Meanwhile, in federal court in Hawaii, U.S. District Judge Leslie Kobayashi issued an order on generative AI that followed the disclosure and certification path.[117] Her directive requires "any party" that utilizes "any generative artificial intelligence (AI) tool in the

110. Hon. Michael J. Newnan, United States District Court for the Southern District of Ohio, Standing Order Governing Civil Cases, at 11 (Dec. 18, 2023), https://www.ohsd.uscourts.gov/sites/ohsd/files//MJN%20Standing%20Civil%20Order%20eff.%2012.18.23.pdf [https://perma.cc/V6P6-BSRZ] (AI provision added July 14, 2023).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Self-Represented Litigants (SRL)*, U.S. DIST. CT. E. DIST. MO.: HON. STEPHEN R. CLARK, C.J. • NATHAN M. GRAVES, CLERK OF CT., https://www.moed.uscourts.gov/self-represented-litigants-srl [https://perma.cc/62D5-CUK9] (articulating the prohibition from use of generative artificial intelligence for pro se litigants).

115. *Id.*

116. *Id.*

117. J. Leslie E. Kobayashi, Chambers of United States District Judge, Disclosure and Certification Requirements – Generative Artificial Intelligence, https://www.hid.uscourts.gov/cms/assets/95f11dcf-7411-42d2-9ac2-92b2424519f6/AI%20Guidelines%20LEK.pdf [https://perma.cc/Z63A-VSQX].

preparation of any documents" to "disclose in the document that AI was used and the specific AI tool that was used."[118] The party must further certify "that the person has checked the accuracy of any portion of the document drafted by generative AI, including all citations and legal authority."[119] The order concludes with a reminder that, if generative AI is used, the party will be held responsible for its contents in accordance with Rule 11 and that failure to make the mandated disclosure and certification may result in the imposition of sanctions.[120]

Citing both *Mata v. Avianca, Inc.* and Judge Starr's order, U.S. Magistrate Judge Jeffrey Cole of the Northern District of Illinois also adopted a standing order on generative AI use.[121] Judge Cole's order notes that "[t]he mission of the federal courts to ascertain truth is obviously compromised by the use of an AI tool that generates legal research that includes false or inaccurate propositions of law and/or purport to cite non-existent judicial decisions cited for substantive propositions of law."[122] The order also requires both disclosure and certification. It cautions filers that Rule 11 will apply, and that:

> [A] certification on a filing will be deemed as a representation by the filer that they have read and analyzed all cited authorities to ensure that such authorities actually exist and that counsel actually have assessed and considered the cited case or other authority offered in support or in contravention of the particular proposition.[123]

118. *Id.*
119. *Id.*
120. *Id.*
121. Mag. J. Jeffrey Cole, United States District Court for the Northern District of Illinois, The Use of "Artificial Intelligence" in the Preparation of Documents Filed Before This Court, https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Cole/Artificial%20Intelligence%20standing%20order.pdf [https://perma.cc/8UP4-NKDJ].
122. *Id.*
123. *Id.*

3. Non-Article III Courts

Beyond trial courts, other federal courts have followed Judge Starr's example and adopted orders governing the use of generative AI. The U.S. Bankruptcy Court for the Northern District of Texas, for example, issued General Order 2023-03, which closely tracks Judge Starr's order, right down to the statement that "[a]rtificial intelligence systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States and are likewise not factually or legally trustworthy sources without human verification."[124] It does not require the disclosure/certification two-step process, however. Instead, if any party has used generative AI in the preparation of any filing, it must "verify that any language that was generated was checked for accuracy, using print reporters, traditional legal databases, or other reliable means."[125] Another bankruptcy court, the U.S. Bankruptcy Court for the Western District of Oklahoma, issued a similar order that also quoted Judge Starr.[126] It requires that any document drafted with the aid of generative AI be accompanied by an attestation that identifies "the program used and the specific portions of text for which a generative artificial intelligence program was utilized," certifies that "the document was checked for accuracy using print reporters, traditional legal databases, or other reliable means," and (in a nod to Judge Vaden) certifies that the use of the AI tool "has not resulted in the disclosure of any confidential information to any unauthorized party."[127]

124. United States Bankruptcy Court for the Northern District of Texas, General Order 2023-03, Pleadings Using Generative Artificial Intelligence (June 21, 2023), https://www.txnb.uscourts.gov/sites/txnb/files/news/General%20Order%202023-03%20Pleadings%20Using%20Generative%20Artificial%20Intelligence-signed.pdf [https://perma.cc/JQ6Y-THKV].

125. *Id.*

126. United States Bankruptcy Court for the Western District of Oklahoma, General Order 23-01, Pleadings Using Generative Artificial Intelligence (July 25, 2023), https://www.okwb.uscourts.gov/sites/okwb/files/GenOrder23-01.pdf [https://perma.cc/X9SG-2ZQ6].

127. *Id.*

4. Appellate Courts

The first (and, to date, only) federal court to give notice of a proposed rule regarding the use of generative AI is the U.S. Court of Appeals for the Fifth Circuit. In late November 2023, the court proposed a change to Fifth Circuit Rule 32.3 to add language addressing AI use to its existing certificate of compliance.[128] The proposed additional language reads:

> Additionally, counsel and unrepresented filers must further certify that no generative artificial intelligence program was used in drafting the document presented for filing, or to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human.[129]

The court also included a proposed form compliance document on which filers could check off in the affirmative or the negative regarding their AI use.[130] The court accepted comments on this proposed rule change until January 4, 2024.[131]

Essentially, the proposed rule imposes an affirmative duty on lawyers to state whether they have used generative AI, and if so, further verify that the document has been reviewed for accuracy. Even those not using generative AI tools will have to fill out a form, check the appropriate box indicating their nonuse, and file it with the court. As some legal observers and analysts have noted, some practitioners are concerned with compelled disclosures like the Fifth Circuit's

128. Jacqueline Thomsen, *Lawyers Must Certify AI Review Under Fifth Circuit Proposal*, BLOOMBERG L. (Nov. 21, 2023, 6:26 PM), https://news.bloomberglaw.com/us-law-week/lawyers-must-certify-ai-review-under-fifth-circuit-proposal [https://perma.cc/LK85-5ACB]; U.S. CT. APPEALS FOR THE FIFTH CIR., NOTICE OF PROPOSED AMENDMENT TO 5TH CIR. R. 32.3 [hereinafter NOTICE OF PROPOSED AMENDMENT TO 5TH CIR. 32.3], https://www.ca5.uscourts.gov/docs/default-source/default-document-library/public-comment-local-rule-32-3-and-form-6 [https://perma.cc/2KY9-PG2R].

129. NOTICE OF PROPOSED AMENDMENT TO 5TH CIR. 32.3, *supra* note 128.

130. *Id.*

131. *Id.*

proposal.[132] Forcing lawyers to publicly disclose use of generative AI tools may discourage lawyers from utilizing new technologies that are not only aimed at enhancing one's legal practice but also present less serious validity concerns. Unlike ChatGPT, generative AI tools like Casetext, Bloomberg Brief Analyzer, and Clearbrief.ai are specifically designed to expedite and simplify legal research while avoiding the problem of hallucinations. OpenAI has also created customizable, internal-only "GPT" programs that law firms can mold to fit specific purposes and feed specialized data sets, making them more reliable than many mainstream generative AI products.[133]

Another concern is that it may be difficult for lawyers to even discern whether they have used generative AI. It may not be obvious to the attorney whether certain legal search engines employ generative AI to conduct case queries. In addition, as more customizable GPTs proliferate, law firms may begin seamlessly incorporating them into standard system software. Even if lawyers are aware that they are using generative AI tools, it may eventually become unreasonable to expect them to verify every generative AI output.

A final concern is that the varied approaches that courts have taken in developing AI rules may result in inefficiencies and confusion. Some courts simply ban the use of generative AI, while others occupy various spots along a spectrum of compliance. Some require disclosure regardless of AI use, while others do not. Courts require different types of certification, focusing on different concerns. For example, although most are focused on the accuracy of AI-generated content, other courts have honed in on concerns like confidentiality (like Judge Vaden of the U.S. Court of International Trade).[134] Lawyers will have to stay abreast of advances in generative AI technology while also ensuring

132. Avalon Zoppo, *Could 5th Circuit's Proposed AI Review Certification Deter Use of the Tech?*, LAW.COM (Dec. 1, 2023, 12:05 PM), https://www.law.com/nationallawjournal/2023/12/01/could-5th-circuits-proposed-ai-review-certification-deter-use-of-the-tech/#:~:text=A%20proposed%20rule%20amendment%20would,helpful%20reminder%20of%20ethical%20obligations [https://perma.cc/W63C-PNV5].

133. Jose Antonio Lanz, *Build Your Own ChatGPT with New Fine-Tuning Feature from OpenAI*, EMERGE (Aug. 22, 2023), https://decrypt.co/153381/chatgpt-gpt-3-5-turbo-openai-customization [https://perma.cc/CV6H-KWMY].

134. Court of International Trade AI Order, *supra* note 94, at 2.

that they are complying with applicable—and often varying—court rules.

5. State Courts

To date, the only state court to adopt a rule or standing order governing the use of generative AI is the 394th District Court in Texas, which maintains general jurisdiction over multiple rural counties in west Texas.[135] One reason for this distinction is the fact that its presiding judge, the Honorable Roy Ferguson, is an early adopter of technology, a member of the State Bar of Texas's Computer and Technology Section Council, and a member of that bar's AI Taskforce.[136] Like Judge Starr's order, Judge Ferguson's "Standing Order Regarding Use of Artificial Intelligence" was issued around the same time as the *Mata v. Avianca, Inc.* sanction ruling.[137] And like Judge Starr's order, Judge Ferguson's order requires that lawyers and self-represented litigants sign and file a certification as to any generative AI use.[138] The Ferguson order requires filers to certify that:

> [A]ll language, quotations, sources, citations, arguments, and legal analysis created or contributed to by generative artificial intelligence were before submission verified as accurate through traditional (non-AI) legal sources by an attorney licensed to practice law in the State of Texas . . . .[139]

135. *See generally* District Court for the 394th Judicial District of Texas, Standing Order Regarding Use of Artificial Intelligence (June 9, 2023) [hereinafter Texas AI Standing Order], https://img1.wsimg.com/blobby/go/2f8cb9d7-adb6-4232-a36b-27b72fdfcd38/downloads/Standing%20order%20Regarding%20Use%20of%20Artificial%20Int.pdf?ver=1702005034427 [https://perma.cc/X877-GY7A].

136. *About the Court*, 394TH DIST. CT. OF TEX., https://texas394th.com/ [https://perma.cc/5KZR-PBKV].

137. Texas AI Standing Order, *supra* note 135, at 2.

138. *Id.* at 3.

139. *Id.* at 2.

The standing order also requires filers to "understand[] and acknowledge[] that they are and will be held responsible . . . for their or their co-counsel's failure to comply" with the order.[140] Attached to the standing order is a form certification that an attorney may fill in, sign, and file.[141] This state court order identifies the same principal concern that most federal courts have with generative AI use—verifying the accuracy of the content of the document filed—but it differs from many of its federal counterparts by not requiring an advance disclosure of AI use (or nonuse) and by not requiring specific identification of the AI tool used and for which corresponding parts of the text.

B. Responses by Other Stakeholders to Attorney Misuse of Generative AI

1. Law Firms and Legal Malpractice Carriers

Amid the fallout from the highly publicized *Mata v. Avianca, Inc.* ruling, large law firms continued to express cautious optimism about the use of generative AI tools. According to the Thomson Reuters Institute's report, *ChatGPT and Generative AI Within Law Firms*, more than eighty percent of the respondents believed that there are ways that this emerging technology can be applied to legal work—yet only three percent acknowledged any generative AI use at their own firms.[142] Of the respondents, eighty percent of partners or managing partners said that their firms had risk concerns, while nearly half that percent of associates (forty-four percent) expressed such a concern.[143]

Large law firms often publicize the positive news about their AI use, such as their adoption of specific tools. For example, Silicon Valley-based international firm Gunderson Dettmer eagerly shared the

140. *Id.*

141. *Id.* at 3.

142. THOMSON REUTERS INST., CHATGPT AND GENERATIVE AI WITHIN LAW FIRMS 4 (2023), https://www.thomsonreuters.com/en-us/posts/wp-content/uploads/sites/20/2023/04/2023-Chat-GPT-Generative-AI-in-Law-Firms.pdf [https://perma.cc/CGW8-SFP7].

143. *Id.* at 14.

story of its success with a "homegrown" generative AI tool, ChatGD.[144] A number of law firms, such as this Article author's former firm, Spencer Fane, however, adopted a policy restricting early use of generative AI.[145] In addition, Attorneys' Liability Assurance Society (ALAS), a risk retention group comprised of owner-insured law firms, issued an advisory to member firms cautioning against the use of generative AI.[146]

While law firms either do not have internal policies governing generative AI or do not publicly disclose them, that does not mean such policies are unnecessary. An appropriate generative AI use policy should reinforce attorneys' ethical obligations and create "guardrails" around the use of AI tools. The policy should educate lawyers not only on the basics of generative AI use, but the ethical dimensions of this use as well. Generative AI should only be used to augment a lawyer's work, not to replace that lawyer's own independent judgment and expertise. Attorneys must still be responsible for reviewing and approving all documents generated with the assistance of AI. Lawyers using these tools must be aware of their limitations and should verify the accuracy of any information from a generative AI source. Attorneys should also make sure that clients are aware of and consent to the use of generative AI. Finally, a worthwhile law firm policy should urge lawyers to remain current on the latest developments involving generative AI—not only because of the rapid pace of innovation, but also because of the attorney's ethical duty of technology competence.

144. Bob Ambrogi, *Four Months After Launching Its 'Homegrown' GenAI Tool, Law Firm Gunderson Dettmer Reports on Results So Far, New Features, and a Surprise on Cost*, LAWSITES (Dec. 20, 2023), https://www.lawnext.com/2023/12/four-months-after-launching-its-homegrown-genai-tool-law-firm-gunderson-dettmer-reports-on-results-so-far-new-features-and-a-surprise-on-cost.html [https://perma.cc/JYY2-RTKU].

145. Justin Henry, *We Asked Every Am Law 100 Law Firm How They're Using Gen AI. Here's What We Learned*, LAW.COM (Jan. 29, 2024, 5:00 AM), https://www.law.com/americanlawyer/2024/01/29/we-asked-every-am-law-100-firm-how-theyre-using-gen-ai-heres-what-we-learned/?slreturn=20240119090431 [https://perma.cc/G9JP-RMAC].

146. Isha Marathe, *Legal Insurer's ChatGPT Warning Is Impacting Law Firms' Generative AI Projects—But Not All*, LAW.COM (Apr. 25, 2023, 6:40 PM), https://www.law.com/legaltechnews/2023/04/25/legal-insurers-chatgpt-warning-is-impacting-law-firms-generative-ai-projects-but-not-all/ [https://perma.cc/ZE9D-2KW6].

2. Taskforces

Another response to generative AI from stakeholders has come in the formation of taskforces. Although usually promulgated by bar associations, MIT convened one of the first of these taskforces in early 2023 in reaction to *Mata v. Avianca, Inc.*[147] The stated purpose of this Task Force on Responsible Use of Generative AI for Law was "to develop principles and guidelines on ensuring factual accuracy, accurate sources, valid legal reasoning, alignment with professional ethics, due diligence, and responsible use of Generative AI for law and legal processes."[148] Chaired by Dazza Greenwood and Shawnna Hoffman, the taskforce sought public feedback on the following principles: (1) the "Duty of Confidentiality to the client in all usage of AI applications"; (2) the "Duty of Fiduciary Care to the client in all usage of AI applications"; (3) the "Duty of Client Notice and Consent[] to the client in all usage of AI applications"; (4) the "Duty of Competence in the usage and understanding of AI applications"; (5) the "Duty of Fiduciary Loyalty to the client in all usage of AI applications"; (6) the "Duty of Regulatory Compliance and respect for the rights of third parties, applicable to the usage of AI applications in your jurisdiction(s)"; and (7) the "Duty of Accountability and Supervision to maintain human oversight over all usage and outputs of AI applications."[149] Intended to be interactive, by early August 2023, MIT released a working draft of these principles, complete with examples of how they might be applied in real life.[150]

147. Dazza Greenwood, *Task Force on Responsible Use of Generative AI for Law*, MIT COMPUTATIONAL L. REP. (Feb. 28, 2023), https://law.mit.edu/pub/generative-ai-responsible-use-for-law/release/9 [https://perma.cc/RTA4-C5TK].

148. *Id.*

149. Stephanie Wilkins, *MIT Taskforce Proposes Principles for the Responsible Use of Generative AI in Legal*, LAW.COM (Aug. 3, 2023, 10:53 AM), https://www.law.com/legaltechnews/2023/08/03/mit-task-force-proposes-principles-for-the-responsible-use-of-generative-ai-in-legal/?slreturn=20240014203056 [https://perma.cc/4VF9-YQTS].

150. *Id.*

The State Bar of Texas started its own taskforce in late June, chaired by the author of this Article.[151] It focuses on exploring "the uncharted frontiers of AI in the legal profession, approaching this new world with caution and optimism, and ensuring that technology serves the legal community and the public without compromising the values central to our profession."[152] The taskforce's members were drawn from not only preeminent attorneys but also representatives of the state and federal judiciary, legal academia, and legal technology providers. The Texas taskforce has made a number of recommendations to the state bar in its interim report, including mandating that Texas lawyers' minimum continuing legal education requirement include one hour of technology education and that the bar's Professional Ethics Committee issue an ethics opinion providing guidance to the state's attorneys on the ethical use of AI.[153]

In July 2023, the New York State Bar Association announced the formation of its own AI taskforce.[154] Chaired by attorney Vivian Wesson, this taskforce was also formed in response to the high-profile incidents of attorneys relying on ChatGPT-produced "research" that turned out to be fabricated.[155] The taskforce was charged to "examine this ever-evolving technology and assess the impact, positive or negative, to the legal profession and community at large."[156] Ultimately, like other taskforces, it intends to issue recommendations aimed at "harnessing AI in an ethical and productive way, while

151. STATE BAR OF TEX., TASKFORCE FOR RESPONSIBLE AI IN THE LAW (TRAIL) 2–3 (2023), https://www.texasbar.com/AM/Template.cfm?Section=Meeting_Agendas_and_Minutes&Template=/CM/ContentDisplay.cfm&ContentID=61655#:~:text=The%20group%20met%20on%20July,the%20work group%20into%20a%20taskforce [https://perma.cc/5JZQ-V3XF].

152. *Id.* at 2.

153. Lynn LaRowe, *AI Task Force Gets Green Light From Texas State Bar Execs*, LAW360 | PULSE (Sept. 7, 2023, 3:19 PM), https://www.law360.com/pulse/articles/1719026/ai-task-force-gets-green-light-from-texas-state-bar-execs [https://perma.cc/73F2-K4WK]; TASKFORCE FOR RESPONSIBLE AI IN THE L., INTERIM REPORT TO THE STATE BAR OF TEXAS BOARD OF DIRECTORS 1, https://www.texasbar.com/AM/Template.cfm?Section=Meeting_Agendas_and_Minutes&Template=/CM/ContentDisplay.cfm&ContentID=62597 [https://perma.cc/9PMP-H2SQ].

154. Richard Lewis, *What the NYSBA AI Task Force Hopes to Achieve for Law Practice*, BLOOMBERG L. (July 31, 2023, 4:00 AM), https://news.bloomberglaw.com/us-law-week/what-the-nysba-ai-task-force-hopes-to-achieve-for-law-practice [https://perma.cc/2Q6X-LC55].

155. *Id.*

156. *Id.*

proactively avoiding pitfalls," like those seen in *Mata v. Avianca, Inc.*[157]

In August, American Bar Association (ABA) President Mary L. Smith announced the formation of a national taskforce.[158] According to the ABA, its group—chaired by attorney Lucy Thomson—would explore risks associated with AI, such as bias, cybersecurity, privacy, and disinformation.[159] The taskforce would also be assigned to examine AI in legal education, AI governance, how to utilize AI to increase access to justice, and "[e]mergent issues with generative AI."[160] Its mission would be to "(1) address the impact of AI on the legal profession and the practice of law, and related ethical implications; (2) provide insights on developing and using AI in a trustworthy and responsible manner; and (3) identify ways to address AI risks."[161]

3. Ethics Bodies

At least two state ethics bodies have responded to the problem of attorney misuse of generative AI. In October 2023, the Florida Bar's Board of Governors Review Committee announced that it planned to consider a proposed advisory opinion on lawyers' use of generative AI, following up on an inquiry by the Bar's Special Committee on AI Tools and Resources.[162] By November 13, 2023, the Committee issued "Proposed Advisory Opinion 24-1," for which it planned to consider

157. *Id.*

158. *ABA Forms Task Force to Study Impact of Artificial Intelligence on the Legal Profession*, AM. BAR ASS'N (Aug. 28, 2023), https://www.americanbar.org/news/abanews/aba-news-archives/2023/08/aba-task-force-impact-of-ai/ [https://perma.cc/9QX2-KXZR].

159. *Id.*

160. *Id.*

161. *Task Force on Law and Artificial Intelligence: Addressing the Legal Challenges of AI*, AM. BAR ASS'N, https://www.americanbar.org/groups/leadership/office_of_the_president/artificial-intelligence/#:~:text=the%20ai%20task%20force%20mission,ways%20to%20address%20ai%20risks [https://perma.cc/EER4-6TQY].

162. *Proposed Advisory Opinion on Lawyers' and Law Firms' Use of Generative Artificial Intelligence*, FLA. BAR (Oct. 13, 2023), https://www.floridabar.org/the-florida-bar-news/proposed-advisory-opinion-on-lawyers-and-law-firms-use-of-generative-artificial-intelligence/ [https://perma.cc/UAK4-87YC].

comments received by January 19, 2024.[163] The proposed advisory opinion addresses such questions as: (1) "Whether a lawyer is required to obtain a client's informed consent to use generative AI in the client's representation"; (2) "Whether a lawyer is required to supervise generative AI and other similar large language model-based technology pursuant to the standard applicable to non-lawyer assistants"; (3) "The ethical limitations and conditions that apply to a lawyer's fees and costs when a lawyer uses generative AI . . . ."; and (4) Whether a law firm may advertise that its "generative AI technology is objectively superior or unique."[164]

Proposed Advisory Opinion 24-1, in response to these questions, admonishes that "lawyers using generative AI must take reasonable precautions to protect the confidentiality of client information, develop policies for the reasonable oversight of generative AI use, ensure fees and costs are reasonable, and comply with applicable ethics and advertising regulations."[165] As to the question of confidentiality, the opinion recommended that "a lawyer using generative AI should take reasonable precautions to avoid the inadvertent disclosure of confidential information and should not attempt to access information previously provided to the generative AI by other lawyers."[166] It also advised that a lawyer should "obtain the affected client's informed consent prior to utilizing a third-party generative AI program if the utilization would involve the disclosure of any confidential information," comparing such a scenario to situations in which attorneys use cloud computing platforms.[167]

Another question tackled by Proposed Advisory Opinion 24-1 dealt with the lawyer's ethical duty of supervision. First, the opinion

163. *Proposed Advisory Opinion 24-1 Regarding Lawyers' Use of Generative Artificial Intelligence – Official Notice*, FLA. BAR (Nov. 13, 2023), https://www.floridabar.org/the-florida-bar-news/proposed-advisory-opinion-24-1-regarding-lawyers-use-of-generative-artificial-intelligence-official-notice/ [https://perma.cc/NC84-S6FG].

164. *Proposed Advisory Opinion on Lawyers' and Law Firms' Use of Generative Artificial Intelligence*, *supra* note 162.

165. *Proposed Advisory Opinion 24-1 Regarding Lawyers' Use of Generative Artificial Intelligence – Official Notice*, *supra* note 163.

166. *Id.*

167. *Id.*

confirmed that "a lawyer must always review the work product of a generative AI just as the lawyer must do so for the work of nonlawyer assistants such as paralegals."[168] This duty applies to both lawyers and nonlawyers under the attorney's supervisory responsibility, as well as to the work of a generative AI operated by a third party.[169] The opinion goes on to explain that lawyers must carefully consider what can be ethically entrusted to generative AI, because "a lawyer may not delegate to generative AI any act that could constitute the practice of law such as the negotiation of claims or any other function that requires a lawyer's personal judgment and participation."[170] As the opinion pointed out, such considerations are particularly necessary in light of law firms' increasing use of AI chatbots for client intake.[171]

Regarding the issue of fees and costs, the proposed opinion reminds lawyers of their ethical obligation to only charge fees that are reasonable. It warns lawyers that although "generative AI programs may make a lawyer's work more efficient, this increase in efficiency must not result in falsely inflated claims of time," nor should the attorney charge for something that might already be covered as overhead.[172] "[W]hile a lawyer may charge a client for the reasonable time spent for case-specific research and drafting when using generative AI, the lawyer should be careful not to charge for the time spent developing minimal competence in the use of generative AI."[173]

Finally, Proposed Advisory Opinion 24-1 addressed the area of attorney advertising. It cautions that "[l]awyers may advertise their use of generative AI but cannot claim their generative AI is superior to those used by other lawyers or law firms unless the claims are objectively verifiable."[174] In closing, the opinion reminds attorneys that because generative AI is "still in its infancy," the ethical concerns

168. *Id.*
169. *Id.*
170. *Id.*
171. *Proposed Advisory Opinion 24-1 Regarding Lawyers' Use of Generative Artificial Intelligence – Official Notice*, *supra* note 163.
172. *Id.*
173. *Id.*
174. *Id.*

discussed in the opinion "should not be treated as an exhaustive list."[175]

The State Bar of California was the second jurisdiction to recognize the necessity of ethical guidance on lawyers' use of generative AI. In November 2023, its Committee on Professional Responsibility and Conduct (COPRAC) provided a memo which "sets forth [its] initial recommendations regarding lawyer use of generative AI."[176] The memo featured an attachment consisting of "Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law," in which it examined how current professional responsibility obligations would be impacted by the use of generative AI.[177] Among the core duties addressed were: (1) the duty of confidentiality; (2) the duties of competence and diligence; (3) the duty to supervise; (4) the duty of candor to the tribunal; and (5) the duty to charge a reasonable fee.[178] The interesting additions to this list were California's ethical duty to comply with applicable law (in other words, do not counsel or assist a client in using generative AI tools in violation of a statute that forbids such use), as well as the state's version of Rule 8.4, which prohibits discrimination (in other words, being aware of the risk of bias when using generative AI).[179]

To date, Florida and California are the first (and only) states whose ethics bodies have confronted attorney use of generative AI. But a special mention goes to the state of Michigan, which issued the first (and only) ethics opinion addressing judges' ethical obligations regarding generative AI. In late October 2023, Michigan issued Judicial Ethics Opinion JI-155, which states that "[j]udicial officers must maintain competence with advancing technology, including but

175. *Id.*

176. Memorandum from the Comm. on Pro. Resp. & Conduct to Members, Bd. of Tr. Sitting as the Regul. and Discipline Comm. 1 (Nov. 16, 2023) [hereinafter California State Bar Memorandum], https://aboutblaw.com/bbpZ [https://perma.cc/TBD7-BRUZ]; Amy Jane Longo, Shannon Capone Kirk & Isaac Sommers, *Bar Associations Begin to Tackle AI & the Practice of Law*, BLOOMBERG L. (Dec. 2023), https://www.bloomberglaw.com/external/document/XB5VKSPG000000/legal-profession-professional-perspective-bar-associations-begin [https://perma.cc/8W3P-CWT8].

177. California State Bar Memorandum, *supra* note 176, at attach. A, p.1

178. *Id.* at attach. A, p.1–5.

179. *Id.* at attach. A, p.3, 5.

not limited to artificial intelligence."[180] The ethics opinion, which cites to *Mata v. Avianca, Inc.*, notes that, "[a]s the use of technology increases, so does the requirement to maintain competence in what is available, how it is used, and whether the use of the technology in question would affect a judicial decision."[181] The opinion begins by noting that Canons 2(B) and (C) of the Michigan Code of Judicial Conduct—which require a judge's conduct to promote public confidence in the integrity and impartiality of the judiciary—can be implicated by judicial use of AI.[182] For example, if a judge used an AI tool whose algorithm or training data reflected bias, that could trigger Canon 2 concerns.[183]

The opinion goes on to discuss the misuse of generative AI by lawyers and the decision by a number of courts around the country to issue rulings or standing orders regarding the use of AI.[184] It expresses no opinion as to the best way for courts to respond, but instead concludes that, "[j]udges must determine the best course of action for their courts with the ever-expanding use of AI."[185] The ethics opinion states that as use of AI expands and as AI tools become sophisticated, it is critical for judges to not only understand the legal, regulatory, and ethical challenges presented by AI but also to "continually evaluate how they or parties before them are using AI technology tools in their own docket."[186]

180. State Bar of Mich., Ethics Op. JI-155 (2023) [hereinafter Michigan Ethics Opinion JI-155], https://www.michbar.org/opinions/ethics/numbered_opinions/JI-155 [https://perma.cc/C58T-GCLX].

181. *Id.*

182. *Id.*

183. The concept of algorithmic bias is one that has been the subject of several court decisions as well as legal scholarship, particularly with regard to risk assessment tools. *See, e.g.*, State v. Loomis, 881 N.W.2d 749, 760–70 (Wis. 2016); John G. Browning & Alex Shahrestani, *Ghosts in the Machine: Algorithmic Bias and the Courts*, 36 COMPUT. & INTERNET LAW. 1, 2 (2019).

184. Michigan Ethics Op. JI-155, *supra* note 180.

185. *Id.*

186. *Id.*

CONCLUSION

In attempting to find answers behind the phenomenon of the "hallucinations" to which generative AI seems prone, researchers at Stanford decided to test the technology.[187] They measured more than 200,000 legal questions on OpenAI's ChatGPT 3.5, Google's PaLM 2, and Meta's Llama2 (all general purpose large-language models not built specifically for legal use).[188] The researchers found that these large-language models hallucinate at least seventy-five percent of the time when answering questions about a court's core ruling.[189] Among its more detailed findings, the study revealed that the models made more frequent mistakes when asked about case law from lower federal district courts and were more accurate on cases from the U.S. Supreme Court.[190] The models also were found to suffer from a "contra-factual bias," in which they were likely to believe a false premise embedded in a user's question.[191] As Professor Daniel Ho, a co-author of the study, cautioned:

> We should not take these very general purpose foundation models and naively deploy them and put them into all sorts of deployment settings, as a number of lawyers seem to have done. . . . Proceed with much more caution—where you really need lawyers . . . to be able to assess the veracity of what an engine like this is giving to you.[192]

The Stanford study provided more confirmation of the problems associated with lawyers' use of generative AI than explanation.

187. Matthew Dahl, Varun Magesh, Mirac Suzgun & Daniel E. Ho, *Large Legal Fictions: Profiling Legal Hallucinations in Large Language Models* 1, ARXIV (2024), https://arxiv.org/pdf/2401.01301.pdf [https://perma.cc/Q3G2-LS2P].

188. *Id.* at 2.

189. *Id.* at 9.

190. *Id.* at 10.

191. *Id.* at 12.

192. Isabel Gottlieb & Isaiah Poritz, *Popular AI Chatbots Found to Give Error-Ridden Legal Answers*, BLOOMBERG L. (Jan. 12, 2024, 5:00 AM), https://news.bloomberglaw.com/business-and-practice/legal-errors-by-top-ai-models-alarmingly-prevalent-study-says [https://perma.cc/6UL6-BMLJ].

Lawyers will always tend to look for ways to increase the speed and efficiency with which they perform tasks; this concept has been behind the adoption of every technological innovation in the history of the legal profession, from the quill pen to the typewriter to the telephone to the computer. But how do we ensure that lawyers not only have at least a rudimentary grasp of the benefits of generative AI, but the risks associated with it as well?

As we have seen, responses by stakeholders in the legal profession vary widely. Courts seek to convey the message punitively (in the form of sanctions) and in draconian fashion—through bans, mandatory disclosures, and certifications. There are many problems inherent in this approach. Such standing orders by courts are a veritable mosaic of inconsistent, individual rulings consisting of wildly varying requirements that fail to account for the ever-changing technology landscape. Databases like Westlaw and LexisNexis already employ AI features for natural language queries;[193] should they need to be disclosed, although there is no risk of fake citations? Should a generative writing assistant like Grammarly have to be disclosed? At what point do the mandatory disclosure and certification requirements (which will add to the time already expended by the lawyer) begin to impede an attorney's work product and legal strategy? Given the fact that Rule 11 of the *Federal Rules of Civil Procedure* and its state counterparts already exist for the purpose of signaling that the attorney warrants the veracity of the document being filed, are these mandatory disclosures and certifications necessary or are they just a solution in search of a problem?

The provision of ethical guidance and education by bar association taskforces and ethics bodies is a much more prudent path for assisting lawyers in dealing with the quandaries associated with the use of generative AI. More education, not more regulation, is the key. The responsible integration of AI in legal practice requires greater education, supervision, and human understanding of AI capabilities

193. Patrick Austin, *LexisNexis and Westlaw Will Launch AI Legal Research Tools*, NAT'L BUS. INST. (July 20, 2023), https://www.nbi-sems.com/Support/BlogDetail/159 [https://perma.cc/D2GL-BLFH].

and limitations. As Chief Justice Roberts warned, a less responsible approach to generative AI risks "dehumanizing the law."[194] Responsible AI integration, on the other hand—a more human-centered focus—augments lawyers, the clients they serve, and the courts.

194. ROBERTS, *supra* note 1.

THE DAWN OF THE "AI JUDGE"? GENERATIVE ARTIFICIAL INTELLIGENCE AND ITS IMPACT ON APPELLATE COURTS

John G. Browning*

I. INTRODUCTION

In his December 2023 Year-End Report on the Federal Judiciary, U.S. Supreme Court Chief Justice John G. Roberts sounded a warning knell about "the latest technological frontier: artificial intelligence (AI)."[1] Even as this technology has "great potential to dramatically increase access to key information for lawyers and non-lawyers alike," he cautioned, "it risks invading privacy interests and dehumanizing the law."[2] The use of AI, Roberts observed, "requires caution and humility," and he predicted that "judicial work—particularly at the trial level—will be significantly affected by AI."[3]

Chief Justice Roberts's words have been borne out by the experience of courts throughout the country. Judges have had to contend with self-represented litigants misusing ChatGPT and other generative AI tools

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1. John G. Roberts, Jr., *2023 Year-End Report on the Federal Judiciary* 5 (2023), https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf.

2. *Id.*

3. *Id.* at 5–6.

to file pleadings and briefs riddled with fabricated case citations and excerpts.[4] Unfortunately, the problem is not limited to those appearing *pro se*. Judges have also had to contend with a steady parade of *lawyers* filing AI-generated motions and briefs filled with such "hallucinations" as well.[5] In response, federal (and some state) trial judges nationally have adopted standing orders addressing the use of generative AI in their courts, many of which require a disclosure by counsel regarding the use of any generative AI tools as well as a certification by the lawyer that he or she has verified the final work product for accuracy.[6]

Although the seismic impact of generative AI on the legal profession has been primarily viewed through the lens of trial judges and the practitioners in their courts, it has made a significant impression on appellate courts as well. What will be the role of generative AI for the appellate judiciary going forward? As this article discusses, generative AI can be leveraged to great advantage by appellate courts, but it also presents significant risks. Our system of justice is based on the public's trust in the integrity and fairness of judicial proceedings, not to mention the trust of the actors in those proceedings—the lawyers and litigants. Judicial use of AI tools in researching and drafting judicial opinions threatens to erode this trust. The solution lies in being transparent and ethical about such use, while developing clear guidelines for judges that stress accountability. Appellate judges should receive greater education and ethical guidance on

4. *See, e.g.*, Taranov *ex rel.* Taranov v. Area Agency of Greater Nashua, No. 21-cv-995-PB, slip op. at 10 n.9 (D.N.H. Oct. 16, 2023); Esquivel v. Kendrick, No. 22-50979, 2023 U.S. App. LEXIS 22839, at *1–2 (5th Cir. Aug. 29, 2023) (per curiam); Morgan v. Cmty. Against Violence, No. 23-cv-353-WPJ/JMR, slip op. at 8 (D.N.M. Oct. 23, 2023).

5. *See, e.g.*, Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 448 (S.D.N.Y. 2023); Park v. Kim, 91 F. 4th 610, 612 (2d Cir. 2024) (per curiam).

6. Cedra Mayfield, *Judicial Crackdown: 'This is Why I Have a Standing Order on the Use of AI'*, LAW.COM (July 27, 2023), https://www.law.com/2023/07/27/judicial-crackdown-this-is-why-i-have-a-standing-order-on-the-use-of-ai/?slreturn=20250120185845.

the use of generative AI. Most importantly, judges must remember that regardless of the technological advances that can support a judge's decision-making, the ultimate responsibility will always remain with the flesh-and-blood judge and his application of very human qualities—legal reasoning, empathy, strong regard for fairness, and unwavering commitment to ethics. These qualities can never be replicated by an AI tool.

The first section of this article examines the issue of "hallucinations"—fabricated case citations generated by an AI tool—and how it is not just a concern for trial judges but for appellate ones as well. According to one survey, legal research is by far the most popular use of generative AI by lawyers, with 57% of lawyers surveyed responding in the affirmative that they have used generative AI to perform legal research.[7] With legal research serving as a cornerstone of the work done by appellate judges and lawyers, it logically follows that developments in this arena will affect appellate courts.

The next section of this article discusses how appellate courts at the state and federal levels have addressed the use of generative AI by the courts themselves. As this section chronicles, there are several states in which the highest court has, as part of its leadership role, adopted policies for the use of generative AI by judicial officers and court attorneys and staff. These policies, to varying degrees, seek to provide valuable guidance on both the benefits and risks of using generative AI tools.

This article then transitions to a discussion of the ethical dimensions of judicial use of generative AI. In stark contrast to attorneys, recognition of a judicial duty to be competent in technology (including AI) is in its infancy. This section critically examines the only two judicial ethics opinions on AI that have been issued as of the spring of 2025, as well as the limited national ethics

7. Stephanie Pacheco, *ANALYSIS: Legal Workers Use AI for Research, Despite Red Flags*, BLOOMBERG LAW (Apr. 4, 2024, 2:00 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-legal-workers-use-ai-for-research-despite-red-flags.

guidance on AI that is available for judicial officers. As this section illustrates, the use of generative AI implicates multiple provisions of the Model Code of Judicial Conduct, regardless of whether an individual state judicial ethics body has chosen to address it.

In the final section, the article confronts the question of whether judicial attitudes toward the use of generative AI may be changing. This section focuses on Eleventh Circuit Court of Appeals Judge Kevin Newsom and his use of generative AI tools in the preparation of opinions in two very different cases—one a civil case involving a fairly innocuous insurance coverage issue, the other a criminal matter centering around an enhancement under the federal sentencing guidelines. Judge Newsom has described his use of generative AI in these opinions as a kind of "mini-experiment,"[8] but could it serve as an example for other appellate judges' use of this technology?

II. THE PROBLEM OF HALLUCINATIONS: NOT JUST FOR TRIAL JUDGES ANYMORE

Generative AI's use in the legal field has been characterized by one of two divergent reactions: either breathless awe and optimistic glee at its capabilities, or existential dread at the prospect of lawyers being "replaced." The doomsayers have taken heart, somewhat, at the intense publicity surrounding each instance of a lawyer's misplaced trust in a generative AI tool being exposed by revelations that the brief or filing was riddled with "hallucinations"—fabricated case citations created by the generative AI tool. In May 2023, *The New York Times* broke the story of two New York plaintiff's attorneys who used ChatGPT as a poor substitute for actual

8. United States v. Deleon, 116 F. 4th 1260, 1273 (11th Cir. 2024) (Newson, J., concurring).

lawyerly work.[9] They brought a personal injury suit on behalf of Roberto Mata against Avianca Airlines in state court; the airline promptly removed the case to federal court and filed a motion to dismiss.[10] Plaintiff's counsel responded with an opposition brief, which cited seven nonexistent case citations generated by ChatGPT—a resource that Mata's lawyers mistakenly thought was a free legal research database.[11] Counsel for Avianca replied, stating that it could not find the cases cited, while others appeared to not support the proposition for which they were cited.[12]

The court ordered plaintiff's counsel to provide the mystery cases. When they could not, the court held a hearing on sanctions. U.S. District Court Judge Kevin Castel took issue with not only the submission of fake cases, but also with counsel's attempts to cover up their bad faith. As the court pointed out, "Respondents advocated for the fake cases and legal arguments . . . after being informed by their adversary's submission that their citations were non-existent and could not be found."[13] Observing that "existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings," Judge Castel held that the two plaintiff's attorneys "abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question."[14] Ultimately, the court sanctioned each lawyer $5,000, ordered them to complete continuing legal education on technology competence and artificial intelligence, directed them to send a copy of the judge's order to their client, and

9. Benjamin Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT*, N.Y. TIMES (May 27, 2023), https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html.

10. *Mata*, 678 F. Supp. 3d at 449.

11. *Id.* at 450–51.

12. *Id.* at 450.

13. *Id.* at 464.

14. *Id.* at 448.

ordered them to write letters of apology to each of the judges falsely identified by ChatGPT as having authored fabricated cases.[15]

Mata v. Avianca, Inc., however, was just the tip of the iceberg, and cases of attorneys using generative AI and citing fabricated cases have continued to pop up all over the country.[16] In such cases, attorneys have been sanctioned or subjected to professional discipline, or both. In all these cases, the problem has not been a lapse in technology, but rather the failure of attorneys to adhere to their ethical obligations. As the Grievance Committee for the Middle District of Florida commented in one case, although "artificial intelligence is becoming a new tool for legal research, it can never take the place of an attorney's responsibility to conduct reasonable diligence and provide accurate legal authority to the Court that supports a valid legal argument."[17]

Mata v. Avianca, Inc. also led to a wave of trial courts around the country issuing either standing orders or amending their local rules to require that attorneys and self-represented litigants disclose any use of generative AI and certify that filings with the court that incorporated AI-generated output had been reviewed by a human being for accuracy. The first of these—within weeks of Judge Castel's show cause order in *Mata v. Avianca, Inc.*—was issued by United States District Court Judge Brantley Starr of the Northern District of Texas (Dallas Division), who updated his individual practice rules to include a "Mandatory Certification Regarding

15. *Id.* at 466.

16. *See, e.g.*, People v. Crabill, 2023 WL 8111898, at *1 (Colo. O.P.D.J. Nov. 22, 2023); *In re* Samuel, 82 Misc. 3d 616, 619 (N.Y. Sur. Ct. 2024); Park v. Kim, 91 F. 4th 610, 612 (2d Cir. 2024) (per curiam); United States v. Cohen, 724 F. Supp. 3d 251, 253 (S.D.N.Y. 2024); Smith v. Farwell, No. 2282-cv-01197, at *1 (Mass. Sup. Ct. Feb. 12, 2024); *In re* Neusom, No. 2:24-mc-2-JES, 2024 WL 1013974 (M.D. Fla. Mar. 8, 2024).

17. Report and Recommendation of the Grievance Committee, *In re* Thomas G. Neusom, No. 2:23-cv-00503-JLB-NPM (M.D. Fla. Jan 11, 2024).

Generative Artificial Intelligence."[18] This rule requires both attorneys and *pro se* litigants to file a certificate "attesting either that no portion of the filing was drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence was checked for accuracy, using print reporters or traditional legal databases, by a human being."[19] Judge Starr's rule goes on to explain why it is necessary—because "[t]hese platforms in their current states are prone to hallucinations and bias."[20] As to the bias aspect, the rule points out that while attorneys are subject to an oath to faithfully uphold the law and set aside personal prejudices, "generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath."[21] Judge Starr's order also spells out consequences for failure to comply:

> Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from an attorney who fails to file a certificate on the docket attesting that the attorney has read the Court's judge-specific requirements and understands that he or she will be held responsible under Rule 11 for the contents of any filing that he or she signs and submits to the Court, regardless of

18. *See* Alan Carrillo, *Dallas Federal Judge Enters Groundbreaking Order for Use of Generative Artificial Intelligence in His Court*, BROWN FOX (June 2, 2023), https://brownfoxlaw.com/dallas-federal-judge-enters-groundbreaking-order-for-use-of-generative-artificial-intelligence-in-his-court/. Judge Starr's original order was no longer publicly available as of the date this article was published. New Local Criminal Rule 47.2(e), "Disclosure of Use of Generative Artificial Intelligence," took effect in September 2024. *See* BRIEFS, CRIMINAL RULE 47.2(e), DISCLOSURE OF USE OF GENERATIVE ARTIFICIAL INTELLIGENCE, U.S. DIST. CT., NORTHERN DIST. TEX., https://www.txnd.uscourts.gov/briefs-0 (last visited Mar. 3, 2025); United States District Court for the Northern District of Texas Special Order No. 2-98 (effective Sept. 3, 2024).

19. Carrillo, *supra* note 18.

20. *Id.*

21. *Id.*

> whether generative artificial intelligence drafted any portion of that filing.[22]

In the wake of Judge Starr's order, more than sixty judges across the country have adopted some form of order or rule regarding the use of generative AI in their courts by attorneys and self-represented litigants.[23] The majority of these are federal trial judges, although there are some state courts represented as well. These orders reflect varied approaches to generative AI use. Some courts simply ban the use of generative AI outright, while others occupy various spots along a spectrum of compliance. Some require disclosure regardless of AI use, while others do not. Courts also require different levels of certification, focusing on different concerns. While most have honed in on the accuracy of AI-generated content, other courts have emphasized concerns like confidentiality. The result is a patchwork of requirements for attorneys and litigants to navigate.

Although some attorneys and scholars have criticized such orders as solutions in search of a problem—since Rule 11 of the Federal Rules of Civil Procedure already makes an attorney subject to sanctions for filing pleadings that are factually or legally inaccurate—the problem of hallucinations in court filings is a serious one. Judge Castel summarized these concerns:

> Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely involved as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession

22. *Id.*

23. For a comprehensive listing, see *Standing Orders and Local Rules on the Use of AI*, ROPES & GRAY LLP, https://www.ropesgray.com/en/sites/artificial-intelligence-court-order-tracker (Feb. 18, 2025).

> and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity.[24]

While most "hallucination cases" have been at the trial court level,[25] the problem of AI-generated fabricated cases presents concerns for appellate courts as well. Sometimes, this is due to the misuse of generative AI by self-represented litigants. For example, in one case, the Fifth Circuit dismissed the appeal of a § 1983 civil rights action by a pro se appellant due in part to the appellant "citing nonexistent cases."[26] In another appellate case, *Kruse v. Karlen*, the Missouri Court of Appeals, Eastern District became the first court of any kind in Missouri to address the use of generative AI in court filings by a litigant.[27]

Kruse v. Karlen was a case in which the plaintiff, Kruse, made claims for unpaid wages, fraudulent inducement, breach of guaranty, and fraudulent misrepresentation stemming from defendant Karlen's alleged failure to pay her wages for work performed as a graphic designer.[28] At the trial court, Karlen (who was pro se) failed to adequately respond to a motion for summary judgment, and it was granted.[29] Subsequently, the trial court entered a final judgment for Kruse in the amount of $311,313.70.[30] Still proceeding pro se, Karlen appealed. Over the course of the appeal, Karlen filed an appellant's brief and a reply brief.[31]

In February 2024, the Missouri Court of Appeals, Eastern District, issued an opinion dismissing the appeal

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24. Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 448–49 (S.D.N.Y. 2023).

25. *See, e.g.*, *id.*

26. Esquivel v. Kendrick, No. 22-50979, 2023 WL 5584168, at *3 (5th Cir. Aug. 29, 2023).

27. Kruse v. Karlen, 692 S.W.3d 43, 46 (Mo. App. E.D. 2024).

28. Jim Ribaudo, *Missouri Courts Tackle Artificial Intelligence*, GOTLAWFIRM BLOG (Feb. 27, 2024), https://gotlawstl.com/missouri-courts-tackle-artificial-intelligence/.

29. *Kruse*, 692 S.W.3d at 46.

30. Ribaudo, *supra* note 28.

31. *Kruse*, 692 S.W.3d at 46.

due to a number of fatal pleading deficiencies, including failure to file an appendix, failure to provide points of error as required under Missouri's rules of appellate procedure, and failure to provide an adequate statement of facts.[32] Most notably, however, the court took issue with the citation of fictitious cases generated by AI in Karlen's filings. The court noted that an "overwhelming majority of the citations are not only inaccurate but entirely fictitious. Only two out of the twenty-four case citations in Appellant's Brief are genuine."[33] As for the only two genuine citations, the court observed that they "do not stand for what Appellant purports."[34] The appellate court meticulously included an itemization of the inaccurate case citations, noting whether each one was a wholly fabricated citation or a fictitious citation using a real case name.[35]

In his reply brief, Karlen attempted to explain away the fabricated citations, claiming that he had hired an online "consultant" to prepare the appellant's brief, since the fee for doing so was "less than one percent of the cost of retaining an attorney."[36] Notwithstanding the apology for these "artificial intelligence hallucinations," the appellate court dismissed Karlen's appeal and awarded Kruse $10,000 toward her attorney's fees for responding to the frivolous appeal.[37]

The court reasoned that filing a brief with "bogus citations" represented a "flagrant violation" of the duty of candor owed to the court.[38] Stating that "[w]e regret that Appellant has given us our first opportunity to consider the impact of fictitious cases being submitted to our Court, an issue which has gained national attention in the rising availability of generative AI," the court pointed

32. *Id.*
33. *Id.* at 48.
34. *Id.* at 48–49.
35. *Id.* at 50.
36. *Id.* at 51.
37. *Id.* at 51, 54.
38. *Id.* at 52.

to appellant's ethical obligations and the violations of the duty of candor owed to the court.[39] Referencing *Mata*, and the trend of trial courts "enacting local rules specifically geared towards prohibiting or disclosing the use of generative AI in court filings," the Court of Appeals called the submission of fabricated cases "an abuse of the judicial system."[40] It called for all parties practicing before the court "to be cognizant that we are aware of the issue and will not permit fraud on this Court."[41]

Unfortunately, appellate courts have had to deal with not just self-represented individuals misusing generative AI, but seasoned attorneys doing so as well. In *Park v. Kim*, the Second Circuit referred an attorney to its Grievance Panel for using ChatGPT and citing nonexistent case authority in her reply brief.[42] In the underlying case, Park's attorney, Jae S. Lee, failed to comply with multiple discovery orders, ultimately resulting in dismissal of her client's case.[43] On appeal, the Second Circuit also addressed Lee's deficient reply brief. Of the only two cases cited in that brief, the court was unable to locate one of them and directed Lee to furnish a copy.[44] She was unable to do so because it did not exist. Lee admitted that she had used ChatGPT, which generated a fictitious case citation (although she implored the court to recognize ChatGPT as "a significant technological advancement").[45] The Court of Appeals, quoting *Mata*'s observation that "[a]n attempt to persuade a court or oppose an adversary by relying on fake opinions is an abuse of the adversary system," concluded that the brief presented a false statement of law to the court.[46] Accordingly, it referred Lee to its Grievance Panel.[47]

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39. *Id.*
40. *Id.*
41. *Id.*
42. Park v. Kim, 91 F. 4th 610, 612 (2d Cir. 2024).
43. *Id.* at 613.
44. *Id.* at 614.
45. *Id.* at 615.
46. *Id.*
47. *Id.* at 615–16.

Less than a month after the sanctions order in *Mata*, a Texas state appellate court had to contend with an attorney citing fabricated case authority.[48] *Ex Parte Lee* was a pre-trial habeas corpus case in the Texas Tenth Court of Appeals.[49] The court denied review based on the appellant's inadequate briefing.[50] The court noted that the "Argument" section of the appellant's brief cited only five cases, including three published "cases" citing to the Southwest Reporter.[51] There was one slight problem, however—according to the court, "[n]one of the three published cases actually exist in the Southwest Reporter."[52] Each "citation" provided a jump-cite into the body of other cases that "had nothing to do with the propositions cited by [the appellant]"—and two of them were from Missouri, instead of Texas.[53] The court noted that even Texas cases with the same names as those cited had nothing to do with the arguments in the brief.[54]

Calling the briefing "illogical" and citing to both *Mata* and Judge Brantley Starr's certification requirement in the Northern District of Texas, the court concluded that "it appears that at least the 'Argument' portion of the brief may have been prepared by artificial intelligence (AI)."[55] Because the court had addressed the issue raised on appeal, it declined to either issue a show cause order like the New York federal court had done, or to report the attorney to the State Bar of Texas for disciplinary action.[56]

In short, the dangers of "hallucinated" case citations and concerns about the ethical lapses by lawyers using generative AI are just as real for appellate courts as they are for trial courts. These concerns may be minimized as

48. *Ex Parte* Lee, 673 S.W. 3d 755, 756 (Tex. App. 2023).
49. *Id.*
50. *Id.* at 756.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 757, n.2.
56. *Id.* at 757.

appellate practitioners make use of generative AI tools designed for the appellate arena, such as Clearbrief.ai and Bloomberg Brief Analyzer. Nevertheless, the concerns will remain, and appellate judges need to remain vigilant about the use of generative AI in their courts.

III. PONDERING AI POLICIES AT THE FEDERAL AND STATE COURT LEVELS

Elon Musk is, in the eyes of many, a genius. However, he is neither a lawyer nor a judge, and he may not have the best understanding or appreciation for what a judge does. In promoting Grok—Musk's generative AI tool—the billionaire entrepreneur implied that AI would eventually replace human judges. Responding to a comment on the platform X about Grok's summarizing capabilities, Musk wrote "With Grok3, we are adding all court cases to the training set. It will render extremely compelling legal verdicts."[57] As one commentator noted, "all court cases" would necessarily include "a lot of bad, cursory, and confusingly drafted opinions that aren't particularly useful to anyone outside the parties," making "a chatbot that spits out opinions" nothing more than a dream.[58]

In reality, AI holds considerable promise for courts, both trial and appellate. It can potentially increase access to justice and assist court users with navigating numerous legal issues without the need for a lawyer. AI can also provide information to judges and organize that data, performing both functions with astonishing speed. One juvenile court judge in Ohio, Judge Anthony Capizzi, uses IBM's Watson AI to analyze voluminous court records and summarize critical information needed

57. Joe Patrice, *Elon Musk Feeds AI 'All Court Cases,' Promises It Will Replace Judges Because He's An Idiot*, ABOVE THE LAW (Dec. 2, 2024), https://abovethelaw.com/2024/12/elon-musk-feeds-ai-all-court-cases-promises-it-will-replace-judges-because-hes-an-idiot/.

58. *Id.*

for his decisions on a "dashboard" that he accesses at the bench in real time.[59]

What AI *cannot* do, however, is actually function as a substitute for judicial decision-making. In a high school graduation address years before the rise of generative AI, Chief Justice John G. Roberts warned about the role that artificial intelligence might play in the future in telling people what to read and watch.[60] "Acquiring more information," he warned, "is less important than thinking about the information you have."[61] The importance of doing what judges are supposed to do—reflect—cannot be overestimated. No matter how much assistance AI can provide, judges will always have the responsibility of providing justice through judgment. And to do so, judges need to understand AI, including not just its functionality but its limitations as well. These limitations include any biases in the development of AI tools. Judges also need to stay abreast of advances in AI. As the Supreme Court of Wisconsin noted in considering the utility of and weaknesses in the AI-based risk assessment tool COMPAS:

> The concerns we address today may very well be alleviated in the future. It is incumbent upon the criminal justice system to recognize that in the coming months and years, additional research data will become available. Different and better tools may be developed. As data changes, our use of evidence-based tools will have to change as well. The justice system must keep up with the research and continuously assess the use of these tools.[62]

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59. Chris Stewart, *Hey Watson: Local Judge First to Use IBM's Artificial Intelligence on Juvenile Cases*, DAYTON DAILY NEWS (Aug. 3, 2017), https://www.daytondailynews.com/news/local/county-judge-first-use-ibm-watson-supercomputer-juvenile-cases/InVqz6eeNxvFsMVAe5zrbL/.

60. Debra Cassens Weiss, *'Beware the Robots,' Chief Justice Tells High School Graduates*, ABA J. (June 8, 2018, 4:10 PM), https://www.abajournal.com/news/article/beware_the_robots_chief_justice_tells_high_school_graduates.

61. *Id.*

62. State v. Loomis, 371 Wis. 2d 235, 242 (2016).

Where will courts, including appellate courts, obtain the necessary guidance in the use of generative AI? On both the state and federal levels, judicial bodies—specifically including appellate courts—have begun to both create committees for the study of judicial use of AI and to formulate official policies providing much-needed guidance on this use. As this section will demonstrate, state appellate courts appear to have devoted considerably more thought in this area than their federal counterparts.

A. State Court Policies

1. Utah

Utah was one of the first states to adopt a rule for judicial use of generative AI. On October 25, 2023, the Utah Judicial Council adopted "Interim Rules on the Use of Generative AI."[63] The Council, which serves as the policy-making body for Utah's judiciary, is chaired by Utah Supreme Court Chief Justice Matthew B. Durrant.[64] The Rules begin with the admonition that "Judges and court employees should recognize the limitations of generative AI and may not rely solely on AI-generated content."[65] They go on to remind judges that "Generative AI tools are intended to provide assistance and are not a substitute for judicial, legal, or other professional expertise."[66] The Rules further state the specific purposes for which AI tools may be used. These include "[p]reparing educational materials," "[l]egal research," "[p]reparing draft documents," and to "test[] [the] reading comprehension of public documents . . . to ensure that a document is

63. INTERIM RULES ON THE USE OF GENERATIVE AI, UTAH JUDICIAL COUNCIL 1 (Oct. 25, 2023), https://nationalcenterforstatecourts.app.box.com/s/px0vzpzzg6n42ng10i4lya4al0mwjhqq.

64. *Court Governance: Utah Judicial Council*, UTAH STATE COURTS, https://www.utcourts.gov/en/about/administration/judicial-council.html (last visited Feb. 28, 2025).

65. INTERIM RULES ON THE USE OF GENERATIVE AI, *supra* note 63, at 1.

66. *Id.*

accessible to a self-represented litigant."[67] Essentially, Utah's Interim Rules provide that while generative AI may be used by judges to research and prepare drafts during the process of deciding a case, it should not be used to create the final version of an order or decision.

Utah's Rules also contain important warnings. They caution users that "generative AI tools have been known to produce outputs that inadvertently promote stereotypes, reinforce prejudices, or exhibit unfair biases."[68] The Rules also stress the importance of having court personnel complete court-approved training before using AI tools, and they mandate that all court employees must first disclose the use of any generative AI tools to their judges.[69] In addition, underscoring the damages of leaked confidential information, the Rules stipulate that that "any information from a case that could lead someone to identify the specific case in question or individuals involved in [the] case may not be entered, submitted, or otherwise disclosed to any generative AI tool."[70] Furthermore, the Interim Rules dictate that even if a document is public, no documents filed in a case or submitted for filing may "be shared through generative AI tools."[71]

Significantly, Utah's Interim Rules make it abundantly clear that any individual—from appellate justice on down—using generative AI in the court system is ethically responsible for the content that is produced. As the first of its Rules unequivocally states, "You are responsible: Any use of AI-generated content is ultimately the responsibility of the person who uses it."[72] In addition, the Rules stress the critical importance of human, judicial review of any AI-generated content related to a given case. Such output, according to the Rules, must be "thoroughly reviewed by a judicial officer to ensure the

67. *Id.* at 2.
68. *Id.* at 1.
69. *Id.*
70. *Id.*
71. *Id.* at 2.
72. *Id.* at 1.

information is accurate, the law is applied properly, and application of the law is consistent with the facts of the case."[73] While this Rule on one level deserves approval of its recognition that AI tools may assist a judge in tasks short of rendering an actual decision, it leaves open the question of just how much assistance AI may provide—so long as the final work product is "blessed" by a judge. This Rule seems to accept a scenario in which an AI tool applies the law, so long as it is (1) done properly; (2) done in a manner consistent with the facts of the case; and (3) "thoroughly reviewed by" a judicial officer. Is "applying the law to the facts" equivalent to deciding the outcome of a case? The Rule is unclear.

Another concern with Utah's Interim Rules rests with its specification that only certain approved generative AI tools may be used by judicial officers and court employees for court-related work. According to the Rules, only "ChatGPT (version 3 or 4)," "Claude.ai (Beta)," or "Bard (Experiment)" are approved for such use.[74] The problem with identifying and prescribing specific approved AI tools is, of course, the rapid pace of innovation. Since Utah published its Interim Rules in October 2023, OpenAI has released a much more robust version of ChatGPT (GPT-4o)[75], Anthropic released Claude 2.1[76] followed by Claude 3,[77] Google replaced Bard with Gemini,[78] and both Westlaw and Lexis introduced AI-powered legal research tools.[79] Providing a list of tools

73. *Id.* at 2.

74. *Id.* at 1.

75. Press Release, OpenAI, Introducing GPT-4o (May 13, 2024), https://openai.com/index/gpt-4o-and-more-tools-to-chatgpt-free/.

76. Press Release, Anthropic, Introducing Claude 2.1 (Nov. 21, 2023), https://www.anthropic.com/news/claude-2-1.

77. Press Release, Anthropic, Introducing the Next Generation of Claude (Mar. 4, 2024), https://www.anthropic.com/news/claude-3-family.

78. Sissie Hsiao, *Bard Becomes Gemini: Try Ultra 1.0 and a New Mobile App Today*, GOOGLE (Feb. 8, 2024), https://blog.google/products/gemini/bard-gemini-advanced-app/.

79. Carrie Brooker, *Thomson Reuters Launches AI-Assisted Research on Westlaw and Additional Generative AI-Powered Solutions*, THOMSON REUTERS (Nov. 15, 2023), https://www.legalcurrent.com/thomson-reuters-launches-ai-

that became obsolete soon after the Rules were issued was shortsighted, to say the least. Given the dizzying speed of advances in generative AI technology, it would have been advisable to be less specific in terms of approved AI tools.

2. New Jersey

Besides Utah, the Supreme Court of New Jersey has also adopted an AI guidance document for judges, approving it on January 23, 2024.[80] This "Statement of Principles" begins by noting the positive contributions of AI, including improved "effectiveness and consistency in court services, including case management, court administration, public accessibility, and transparency."[81] It then cautions that "[j]udges and their staff may use AI only for select purposes, such as for preliminary gathering and organization. AI will never be used to replace the autonomy of judges but may serve as a tool to support and enhance judicial functions."[82]

Beyond emphasizing the importance of maintaining judicial independence, New Jersey's Statement of Principles also reaffirms the necessity of ensuring judicial integrity and public confidence in the work of the judiciary by using AI in a bias-free manner. The Statement calls for rigorously assessing the AI technologies "to ensure that they meet the highest standards of ethical considerations and are as free from bias as possible."[83]

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assisted-research-on-westlaw-and-additional-generative-ai-powered-solutions/; Press Release, LexisNexis, LexisNexis Launches Lexis+AI, a Generative AI Solution with Hallucination-Free Linked Legal Citations (Oct. 25, 2023), https://www.lexisnexis.com/community/pressroom/b/news/posts/lexisnexis-launches-lexis-ai-a-generative-ai-solution-with-hallucination-free-linked-legal-citations.

80. STATEMENT OF PRINCIPLES FOR THE NEW JERSEY JUDICIARY'S ONGOING USE OF ARTIFICIAL INTELLIGENCE, INCLUDING GENERATIVE ARTIFICIAL INTELLIGENCE, N.J. SUP. CT. 1 (Jan. 23, 2024), https://www.njcourts.gov/sites/default/files/courts/supreme/statement-ai.pdf.

81. *Id.* at 2.

82. *Id.* at 1.

83. *Id.*

Cybersecurity is another concern addressed in New Jersey's Statement of Principles. It calls upon the judiciary to "take appropriate steps to ensure the safety and security of AI technologies," and pledge that AI tools used by the judicial branch will only be used "in ways that maintain confidentiality and that safeguard the security of Judiciary systems and the data contained in those systems."[84]

Finally, in a nod to the ways in which AI can hopefully improve access to justice, the Statement provides that AI tools "will be used to support equity for all parties to the case, to maximize access to the courts, and to reduce unnecessary delays in case disposition."[85] Accompanying this commitment to fairness is an equal commitment to transparency, with the Statement of Principles calling for the judiciary to use AI tools "with appropriate requirements of disclosure so as to support public trust and confidence in the courts."[86]

If Utah's Interim Rules suffer from the sin of hyperspecificity, New Jersey's Statement of Principles has the opposite problem of vagueness. It is long on good intentions and lofty aspirations, but short on specific details for guiding judges.

3. Connecticut

Connecticut's Judicial Branch has also adopted a guidance statement on court use of AI; its twenty-one page "Artificial Intelligence Responsible Use Framework" was issued on February 1, 2024.[87] This document is largely a rose-colored vision of how AI can be successfully utilized by courts, provided there are adequate safeguards and education. The framework articulates

84. *Id.* at 1–2.

85. *Id.* at 1.

86. *Id.* at 2.

87. ARTIFICIAL INTELLIGENCE RESPONSIBLE USE FRAMEWORK, STATE OF CONNECTICUT JUDICIAL BRANCH 1 (Feb. 1, 2024), https://www.jud.ct.gov/faq/CTJBResponsibleAIPolicyFramework2.1.24.pdf.

various policies and procedures in general terms, "concerning the development, procurement, implementation, utilization, and ongoing assessment of systems that employ AI."[88] The guidance also includes an "impact assessment" of methodology to ensure that AI is used in a safe manner without compromising privileged and confidential information.[89]

Like New Jersey's policy, Connecticut's guidance document is lacking in specificity. It does, however, provide a warning that large language models (LLMs) "may generate content that is incorrect or fictitious."[90] Pointing out that such content "may seem reasonable and not be readily distinguishable from factual information," Connecticut's framework stresses the importance of making sure that judges and court employees "review all information obtained from the LLM for accuracy, veracity, and completeness."[91] Like Utah's policy, Connecticut's advisory statement emphasizes that the ultimate responsibility for the AI tool's output rests with the judge or court employee, who are "responsible for their work product, regardless of what portion of it is produced by the LLM."[92] The Connecticut Framework for AI use also reminds judges and court employees to avoid using generative AI tools in "any way that infringes copyrights or on the intellectual property rights of others," or in any way "that could cause reputational harm to the Judicial Branch."[93]

Interestingly, Connecticut's Framework for judicial use of AI contains something other state court AI policies do not: directions on citation. It directs judges and court employees to "appropriately cite the use of AI where required by law."[94] The "standard" citation format,

88. *Id.* at 4.
89. *Id.* at 16.
90. *Id.* at 9.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*

according to the Framework, should read that "This content was [drafted, edited, translated] with the assistance of a generative artificial intelligence, [Bard, ChatGPt]. The content has been reviewed and verified to be accurate and complete, and represents the intent of [office, department, division, the Judicial Branch, or a person's name]."[95] This is an interesting counterpart to the many federal trial courts nationwide who require an *attorney* to certify that a filing prepared with the aid of a generative AI tool has been reviewed for accuracy by the lawyer who prepared the brief or pleading.

4. Delaware

One of the more recent state supreme courts to adopt a policy on generative AI use by judges and court staff is Delaware. On October 21, 2024, the Supreme Court of Delaware adopted its Interim Policy on the Use of Generative AI by Judicial Officers and Court Personnel.[96] This policy was the work of two committees: the Supreme Court's Rules and Professionalism Committee and the Delaware Commission on Law and Technology (DCLT), an arm of the Delaware Supreme Court charged with examining developing technologies like AI with the specific aim of providing education and guidance to the legal community.[97] The Court, acting through these two bodies, elected to keep its policy brief on purpose, because of the fact that "Generative AI technology is evolving at such a rate that delving into technical specifics could lead to outdated, inaccurate and even counterproductive guidance within days of adopting any new policy."[98]

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95. *Id.*

96. Order Interim Policy on the Use of Generative AI by Judicial Officers and Court Personnel, DEL. SUP. CT. (Oct. 21, 2024), https://courts.delaware.gov/forms/download.aspx?id=266848 [hereinafter "Delaware Supreme Court Order"].

97. *Id.*

98. Press Release, Del. Sup. Ct., Delaware Supreme Court Adopts Interim Policy Providing Guidance on the Use of Generative Artificial Intelligence by Judicial Officers and Court Personnel (Oct. 22, 2024), https://courts

The policy begins with a series of defined terms. It defines "Generative AI" (or GenAI) as "Artificial Intelligence trained on an existing set of data" which can create "new data objects contextually in response to user prompts based only on the data it has already been trained on."[99] It also describes an "Authorized User" as "all judicial branch judicial officers, employees, law clerks, interns, externs, and volunteers."[100]

The brief policy begins with a statement that echoes the "responsibility provisions" of other high court AI policies. According to the policy, "Any use of GenAI output is ultimately the responsibility of the Authorized User."[101] Users are responsible for the accuracy of whatever is produced, and consequently they "must use caution when relying on the output of GenAI."[102] Because of this responsibility, the policy continues, users have a duty to educate themselves on AI tools, how to use them properly, and otherwise comply with existing court rules and policies.[103]

The next significant component of Delaware's AI policy is its recognition that AI use may not interfere with or substitute for judicial decision-making. The policy mandates that "Authorized Users may not delegate their decision-making function to . . . GenAI."[104] It also advises against the use of non-approved GenAI programs, since such use could potentially make confidential information public.[105] Delaware Supreme Court Justice Karen Valihura, a co-chair of the Commission, characterized the policy as a recognition of the fact that "there are potential pitfalls and dangers associated with [generative AI]," and the Court believes that having such a policy

.delaware.gov/forms/download.aspx?id=266868 [hereinafter "Press Release, Delaware Supreme Court Adopts Interim Policy"].

99. Delaware Supreme Court Order, *supra* note 98.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

"provides our judges and employees some needed and appropriate guardrails."[106]

5. Georgia

On the day after Delaware announced its AI policy, the Supreme Court of Georgia issued an order of its own, appointing the members of the Judicial Council of Georgia Ad Hoc Committee on Artificial Intelligence and the Courts.[107] This committee, chaired by Justice Andrew A. Pinson, is charged with "assessing the risks and benefits associated with the use of Generative AI in the courts and making recommendations to help maintain public trust and confidence in the judicial system as the use of AI increases over the coming years."[108] The sixteen-person committee, which held its first meeting the following day, is primarily composed of judges, clerks, and court administrators; the remaining three committee members include a representative from the State Bar of Georgia, the Public Defender Council, and the solicitor-general for Georgia's Cherokee County.[109]

Like certain other states, Georgia has taken a two-pronged approach. Its highest court, acting through this committee, has elected to focus on the risks and benefits associated with generative AI use by the courts. At the same time, the State Bar of Georgia has created its own Special Committee on Technology, Artificial Intelligence, Tools, Resources, and Legal Obligations.[110] This body

106. Press Release, Delaware Supreme Court Adopts Interim Policy, *supra* note 98.

107. Press Release, Ga. Sup. Ct., Chief Justice Establishes Committee to Examine Impacts of Artificial Intelligence on the Judiciary (Oct. 22, 2024), https://www.gasupreme.us/10-22-2024-chief-justice-establishes-committee-to-examine-impacts-of-artificial-intelligence-on-the-judiciary/ [hereinafter "Press Release, Georgia Chief Justice Establishes Committee"].

108. *Id.*

109. Order Judicial Council Ad Hoc Committee on Artificial Intelligence and the Courts, Ga. Sup. Ct. (Oct. 22, 2024), https://www.gasupreme.us/wp-content/uploads/2024/10/AI-Committee-Order-_Issued-10.22.24-1.pdf.

110. Press Release, Georgia Chief Justice Establishes Committee, *supra* note 107.

"will explore how the Georgia Rules of Professional Conduct and Bar policy should take into account legal practitioners' use of artificial intelligence," before making recommendations to the Supreme Court of Georgia and the Georgia Bar's Board of Governors.[111]

6. Texas

Georgia is not alone in such an approach. In Texas, the State Bar of Texas formed its Taskforce for Responsible Artificial Intelligence in the Law in July 2023.[112] In early 2024, this taskforce published its Interim Report to the Texas Bar's Board of Directors, in which it recommended (among other measures) the issuance of a formal ethics opinion for Texas practitioners on the use of generative AI as well as "the inclusion of AI topics in professional education for both lawyers and judges."[113] Meanwhile, the Supreme Court of Texas, through its Supreme Court Advisory Committee, has been analyzing whether or not Texas's Rules of Evidence need to be updated or revised to take into consideration purported evidence generated or enhanced by AI.[114] Neither Texas's highest court nor its AI Taskforce, however, are studying or proposing policies regarding use of generative AI by judicial officers.

7. Alabama

Similarly, the Supreme Court of Alabama recently formed a Taskforce on Artificial Intelligence. Its stated goal is to examine Alabama's Rules of Professional

111. *Id.*

112. The author served as Chair of this Taskforce during its initial year, until June 2024.

113. INTERIM REPORT TO THE STATE BAR OF TEXAS BOARD OF DIRECTORS, TASKFORCE FOR RESPONSIBLE AI IN THE LAW 1, https://www.texasbar.com/AM/Template.cfm?Section=Meeting_Agendas_and_Minutes&Template=/CM/ContentDisplay.cfm&ContentID=63475.

114. The author currently serves as a member of the Texas Supreme Court Advisory Committee, and of its AI Subcommittee.

Conduct to determine "if any modifications need to be made for making attorneys and parties aware that they could face sanctions for using AI-generated pleadings that reference phantom or ghost citations."[115] While this taskforce has not explicitly undertaken the subject of judicial use of generative AI as opposed to attorney use, it is empowered "to pursue any other concerns with the use of AI."[116]

8. New York

While the New York Judiciary has not yet promulgated any rules or policies regarding judicial use of generative AI, the New York City Bar Association—acting through its Working Group on Judicial Administration—released a report with recommendations in June 2024 entitled *Artificial Intelligence and the New York State Judiciary: A Preliminary Path*.[117] Although this report and its recommendations have not yet been adopted by the judicial branch, it is significant in its scope, which includes such topics as how AI might improve workflows and other aspects of court operations, as well as more typical concerns like the evidentiary issues presented by AI.[118]

Among other observations, the report noted the strong potential use of generative AI by judges (including appellate judges), their law clerks and staff attorneys, and other judicial staff. The Working Group expressed the belief that if judges use an AI tool, they should do so only if (1) the tool accesses and relies on a closed and approved data set (e.g., the text of case law, statutes, and rules), (2) the tool includes citations the judge can verify,

115. Email from Chief Justice Tom Parker to Taskforce Members (Jan. 9, 2025) (copy on file with author, who is an appointed member of the Taskforce).

116. *Id.*

117. ARTIFICIAL INTELLIGENCE AND THE NEW YORK STATE JUDICIARY: A PRELIMINARY PATH, N.Y. CITY BAR WORKING GRP. ON JUDICIAL ADMIN. & ARTIFICIAL INTELLIGENCE 1 (June 2024), https://www.nycbar.org/wp-content/uploads/2024/06/20221290_AI_NYS_Judiciary.pdf.

118. *Id.* at 2.

and (3) the tool is designed such that third parties cannot access the prompts and searches used by judges or their staff, or use them for other purposes including to further train an AI model.[119]

Although it acknowledges that appellate judges and their staff may look to AI as a tool to generate text, "including as a first draft of all or part of opinions," or to conduct more robust and sophisticated legal research, the Working Group urges caution.[120] Not only would any such usage "require significant human involvement to check the accuracy of the text" and any cases cited, it points out this use might lead to undue influence on or instill laziness in judges.[121] Judges using AI to generate the text of an opinion might be influenced "in unintended ways" on how they might rule on an issue, and an over-reliance on AI "might reduce the amount of original judicial drafting that for generations has been the hallmark of establishing new legal concepts."[122]

9. Arizona

Although Arizona has not yet issued its own policy governing judicial use of generative AI, the Supreme Court of Arizona has taken preliminary steps in that direction. On January 24, 2024, then-Chief Justice Robert Brutinel ordered the creation of the Arizona Steering Committee on Artificial Intelligence and the Courts.[123] In this order, the court noted that "AI technologies present unprecedented opportunities and challenges and have the potential to further improve the way courts process cases, streamline workflows and analyze legal

119. *Id.* at 4.

120. *Id.* at 5.

121. *Id.*

122. *Id.*

123. Order Establishing the Arizona Steering Committee on Artificial Intelligence and the Courts, AZ. SUP. CT. (Jan. 24, 2024), https://www.azcourts.gov/Portals/22/admorder/Orders24/2024-33.pdf?ver=Wga82VXaI00ghnRazZUqWA%3d%3d.

information, and impact decision-making."[124] However, the court continued, it was necessary to approach AI's use by judges in a way that takes into account "ethical issues, proper handling of confidential information, understanding of possible biases, and the proper use of these new technologies."[125]

To facilitate this, the Arizona Supreme Court appointed nineteen members to this newly-founded Steering Committee, including trial and appellate judges, court clerks, practicing attorneys, and at least one law professor.[126] The Committee was charged with a number of tasks directed toward the "implementation, evaluation, and ethical use of AI technologies within the state's judicial system."[127] It was also tasked with developing and recommending guidelines "to ensure the responsible use of AI in the judiciary, mitigating potential biases and upholding the principles of fairness and justice."[128] On November 14, 2024, the Steering Committee issued a brief (six-page) listing of best practices for Arizona lawyers and judges regarding the use of generative AI. While most of this guidance is directed at lawyers, it does remind judges that responsible use of generative AI is encompassed under their duties of competence and diligence, as well as their duty to avoid the disclosure of sensitive or confidential information. The guidance also recommends that supervising judges consider adoption of policies addressing the use of generative AI.[129]

10. Illinois

The most recent state supreme court to issue a policy regarding judicial use of generative AI is the Supreme

124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. SUPREME COURT OF ARIZONA STEERING COMMITTEE ON ARTIFICIAL INTELLIGENCE AND THE COURTS, GENERATIVE AI: ETHICAL BEST PRACTICES FOR LAWYERS AND JUDGES (Nov. 14, 2024).

Court of Illinois, and the policy took effect January 1, 2025.[130] Like its counterparts in other states, the Illinois policy emphasizes that judges remain accountable for their work product, declaring, "Judges remain ultimately responsible for their decisions, irrespective of technological advancement."[131] And, like several of its other state counterparts, this policy was the product of a taskforce—in this instance, the Illinois Judicial Conference (IJC) Taskforce on Artificial Intelligence formed in early 2024.[132]

The Illinois policy acknowledges that while the integration of AI with the courts offers "potential efficiencies and improved access to justice," it also raises concerns about "authenticity, accuracy, bias, and the integrity of court filings, proceedings, evidence, and decisions."[133] Because of this, it urges Illinois judges to understand both the capabilities and limitations of generative AI, and to remain "vigilant against AI technologies that jeopardize due process, equal protection, or access to justice."[134] While use of AI by attorneys, judges, judicial clerks, research attorneys, and court staff not only "should not be discouraged" but is also "authorized," it must comply with "legal and ethical standards," according to the policy.[135] Disclosure of AI use will not be

130. Laura Bagby, *Illinois Supreme Court Releases Policy on AI in State Courts*, 2CIVILITY (Jan. 10, 2025), https://www.2civility.org/illinois-supreme-court-releases-policy-on-ai-in-state-courts/.

131. ILLINOIS SUPREME COURT POLICY ON ARTIFICIAL INTELLIGENCE, ILL. SUP. CT. 2, https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/e43964ab-8874-4b7a-be4e-63af019cb6f7/Illinois%20Supreme%20Court%20AI%20Policy.pdf (emphasis omitted).

132. Press Release, Ill. Sup. Ct., Illinois Supreme Court Announces Policy on Artificial Intelligence, https://www.illinoiscourts.gov/News/1485/Illinois-Supreme-Court-Announces-Policy-on-Artificial-Intelligence/news-detail/#:~:text=The%20IJC%20AI%20Task%20Force,Trial%20Court%20Administrator%20Thomas%20R. "The IJC is the body charged with strategic planning for the Illinois Judicial Branch and is comprised of 29 voting members: 15 judges and 14 non-judges, with the Chief Justice as chair. *Id.*

133. ILLINOIS SUPREME COURT POLICY ON ARTIFICIAL INTELLIGENCE, *supra* note 131, at 2.

134. *Id.*

135. *Id.*

required (unlike in various federal courts), but the policy admonishes all users—including judges—to "thoroughly review AI-generated content before submitting it in any court proceeding to ensure accuracy and compliance with legal and ethical obligations."[136]

Illinois's policy is significant for a number of reasons. Consistent with other state policies, it recognizes the importance of AI as a watershed development and a potential paradigm shift in the way law is being practiced. The policy also is unequivocal about the fact that while judges and their staff can and should use AI tools, they remain solely responsible for their decisions and any final work product in which generative AI played any role. In addition, to a greater degree than its other state counterparts, Illinois's AI policy underscores the importance of adhering to laws and regulations regarding privacy and confidentiality. It flatly declares that AI applications "must not compromise sensitive information, such as confidential communications, personal identifying information (PII), protected health information (PHI), justice and public safety data, security-related information, or information conflicting with judicial conduct standards or eroding public trust."[137] Finally, in another marked departure from its other state counterparts, the Illinois policy anticipates the needs of its core audience of judges. Accompanying release of the policy is a handy "judicial reference sheet," containing key definitions, examples of prompts, links to other reference sources like the National Center for State Courts, and tips on what to watch for as a judge.[138] This judicial reference also contains brief snapshots of ethical concerns for judges about using AI, as well as judicial AI

136. *Id.*

137. *Id.*

138. ILLINOIS SUPREME COURT POLICY ON ARTIFICIAL INTELLIGENCE JUDICIAL REFERENCE SHEET, ILL. SUP. CT. (Jan. 1, 2025), https://ilcourtsaudio.blob.core.windows.net/antilles-resources/resources/cb3d6da3-66c7-469d-97f3-41568bdeee8c/ISC%20AI%20Policy%20Bench%20Card.pdf.

utilization guidelines addressing issues like technology competence and confidentiality.[139]

11. The National Center for State Courts

Although only a handful of state supreme courts have issued policies or guidance documents for judges on the use of generative AI by judicial officers and staff, there is also help available for jurists from national organizations. In May 2024, the National Center for State Courts issued interim guidance for judges, focusing on *AI and the Courts: Judicial and Legal Ethics Issues*.[140] This brief, two-page guide provides judicial officers with a snapshot of the key judicial ethical obligations implicated by the use of AI, including the importance of adhering to the duty of confidentiality, avoiding ex parte communications, performing duties with impartiality and fairness, and living up to the duty to supervise staff.[141] The document provides references to specific portions of the Model Code of Judicial Conduct. It also emphasizes that judges, like lawyers, "have a basic duty to be competent in technology relevant to their profession."[142] Among other considerations, judges not only have to have a basic understanding of generative AI's capabilities and risks, they should also identify "which issues may require new policies or rules for AI use in the court system."[143]

In August, the National Center for State Courts expanded its guidance for judges on generative AI with an eighteen-page white paper.[144] This work not only covers

139. *Id.*

140. AI AND THE COURTS: JUDICIAL AND LEGAL ETHICS ISSUES, NAT'L CTR. FOR STATE CTS. (May 2024), https://www.ncsc.org/__data/assets/pdf_file/0010/101125/ncsc-ai-rrt-judicial-legal-ethics-may-2024.pdf.

141. *Id.*

142. *Id.*

143. *Id.*

144. ARTIFICIAL INTELLIGENCE: GUIDANCE FOR USE OF AI AND GENERATIVE AI IN COURTS, NAT'L CTR. FOR STATE. CTS. (Aug. 7, 2024),

the ethical dimensions of judicial AI use, it provides a helpful background on understanding AI, addresses "deepfakes" and other evidentiary concerns for courts, and gives helpful instruction on developing an internal AI use policy for a given court.[145] The white paper also goes into more detail on training judges and their court personnel on AI systems, and explores the potential tasks for which AI may be put to use in a court setting—such as summarizing and organizing large sets of data, composing emails and memoranda, and assisting in creating presentations.[146]

That same month, the Conference of State Court Administrators (COSCA) released its own policy paper.[147] This sixteen-page guide describes how AI can streamline administrative tasks and expand access to justice. Although it highlights the importance of the ethical implications of judicial AI use as well as the privacy and bias risks, this policy nevertheless recommends that all courts establish AI taskforces to "develop[] a responsive and flexible institutional framework for the use of generative AI."[148]

In short, state courts have been at the forefront of educating judges about generative AI and in addressing judicial use of this technology through the promulgation of formal policies. These policies serve not only as important sources of education, but of governance as well. Certain fundamental principles are recurring features in these guidance documents, including not only that judges must attain and maintain competence in technology (including generative AI), but also that judges (like lawyers) are responsible for verifying the accuracy of an

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https://www.ncsc.org/__data/assets/pdf_file/0014/102830/ncsc-artificial-intelligence-guidelines-for-courts.pdf.

145. *Id.* at 6–14.

146. *Id.* at 16.

147. GENERATIVE AI AND THE FUTURE OF THE COURTS: RESPONSIBILITIES AND POSSIBILITIES, CONF. OF STATE CT. ADM'RS (Oct. 16, 2024), https://cosca.ncsc.org/__data/assets/pdf_file/0018/103392/COSCA-Policy-Paper_AI_P2.pdf.

148. *Id.* at 15.

AI tool's output. However, federal appellate courts have been considerably less active in addressing judicial use of generative AI.

B. Federal Appellate Court Rules and Policies

With regard to federal appellate courts and the issuance of policies or rules concerning the use of generative AI, the landscape is as yet unformed. Although Judge John Nalbandian of the Sixth U.S. Circuit Court of Appeals has expressed skepticism toward the restrictions on AI use by attorneys imposed by federal trial judges, calling them "misplaced," the Sixth Circuit has not formulated any rules or policies to address this cutting edge technology.[149] The Ninth Circuit formed its own AI Committee in January 2024, chaired by U.S. Circuit Judge Eric Miller.[150] However, it has not yet issued any proposed rules or formulated any policies. In an email exchange with a member of that committee, attorney A.J. Bahou declined to comment on the committee's plans.[151] Like its San Francisco-based counterpart, the Philadelphia-based Third Circuit Court of Appeals has also established an AI Committee; however, it too has yet to issue any rules or policies.[152]

To date, the only federal appellate court to take at least a preliminary step toward adopting a rule regarding use of generative AI is the New Orleans-based Fifth Circuit. In November 2023, the court gave notice that it was considering adopting a rule addressing the use of AI

149. Nate Raymond, *U.S. Appellate Judge Calls Bans on AI Use by Lawyers 'Misplaced'*, REUTERS (Apr. 5, 2024, 11:04 AM), https://www.reuters.com/legal/transactional/us-appellate-judge-calls-bans-ai-use-by-lawyers-misplaced-2024-04-05.

150. Nate Raymond & Sara Merten, *Two U.S. Appeals Courts Form Committee to Examine AI Use*, REUTERS (Jan. 25, 2024, 4:21 PM), https://www.reuters.com/legal/government/9th-circuit-forming-committee-examine-ai-use-court-2024-01-25/.

151. Email from A.J. Bahou to author (Jan. 6, 2025) (on file with author).

152. Raymond & Merten, *supra* note 150.

by attorneys and self-represented litigants.[153] The proposed amendment to Fifth Circuit Rule 32.3 would have added the following language to the required Certificate of Compliance:

> Additionally, counsel and unrepresented filers must further certify that no generative artificial intelligence program was used in drafting the document presented for filing, or to the extent such a program was used, all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human . . . .[154]

The court accepted public comments on the proposed new rule until January 4, 2024. Afterward, it declined to adopt the rule, saying essentially that existing obligations of parties and lawyers were sufficient:

> Parties and counsel are reminded of their duties regarding their filings before the court under Federal Rule of Appellate Procedure 6(b)(1)(B). Parties and counsel are responsible for ensuring that their filings with the court, including briefs, shall be carefully checked for truthfulness and accuracy as the rules already require. "I used AI" will not be an excuse for an otherwise sanctionable offense.[155]

While no federal appellate court to date has articulated a formal policy or rule regarding either attorney or judicial use of generative AI, the example of Eleventh Circuit Judge Kevin Newsom, which is discussed further in Section V, demonstrates that judicial use may yet gain traction among appellate judges. As we shall see with Judge Newsom's "modest proposal" involving AI use by a

153. Nate Raymond, *US Appeals Court Proposes Lawyers Certify Review of AI Use in Filings*, REUTERS (Nov. 22, 2023, 1:45 PM), https://www.reuters.com/legal/transactional/us-appeals-court-proposes-lawyers-certify-review-ai-use-filings-2023-11-22/.

154. 5th Cir., Notice of Proposed Amendment to 5TH CIR. R. 32.3, https://fingfx.thomsonreuters.com/gfx/legaldocs/mopajaxmava/11222023ai_5th.pdf.

155. COURT DECISION ON PROPOSED RULE, 5TH CIR., https://www.ca5.uscourts.gov/docs/default-source/default-document-library/court-decision-on-proposed-rule.pdf?sfvrsn=5967c92d.

judicial officer in a transparent (and limited) manner,[156] there is a future for judicial use of this technology that informs opinion-writing, but which does not substitute for judicial decision-making.

IV. JUDICIAL ETHICS AND AI

With the rapidly shifting legal landscape as generative AI enters not just courtrooms but judicial chambers as well, an ethical dilemma looms. How will we ensure the technological competence of judges in using or overseeing the use of generative AI? While forty states have adopted a duty of technological competence for attorneys since the American Bar Association modified Model Rule of Professional Conduct 1.1 in 2012,[157] there has been no similar change to the Model Code of Judicial Conduct (MCJC). The author has called for change in this regard, given judges' increased use of technology and the deluge of technology-related issues and digital evidence in courts.[158] Until recently, however, few voices have joined in and demanded that the canons of judicial ethics explicitly add a duty of technology competence.

In the face of other technological innovations over recent years such as the rise of social media, many have no doubt presumed a duty to be competent in technology as implied in MCJC 2.5. Rule 2.5 states that "A judge shall perform judicial and administrative duties, competently and diligently."[159] The first comment to this Rule states that in the performance of judicial duties, competence "requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary to perform a

156. Snell v. United Specialty Ins. Co., 102 F. 4th 1208, 1221 (11th Cir. 2024) (Newson, J., concurring).

157. Bob Ambrogi, *Another State Adopts Duty of Technology Competence for Lawyers, Bringing Total to 40*, LAWSITES (Mar. 24, 2022), https://www.lawnext.com/2022/03/another-state-adopts-duty-of-technology-competence-for-lawyers-bringing-total-to-40.html.

158. *See* John G. Browning, *Should Judges Have a Duty of Tech Competence?*, 10 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 176 (2020).

159. MODEL CODE OF JUDICIAL CONDUCT r. 2.5 (AM. BAR ASS'N 2020).

judge's responsibilities of judicial office."[160] Comment 2 to MCJC 2.5 reminds us that to discharge these responsibilities, a judge should seek not only the resources and staff needed to do so, but the "expertise" as well.[161]

The National Center for State Courts has issued an interim guidance statement for judges in which it discussed the fact that "competence in technology is an ethical requirement" for judges.[162] Among other admonitions, this guidance states that judicial officers must "[h]ave a basic understanding of AI, including generative AI, and its capabilities."[163] It further reaffirmed that MCJC 2.5 "imposes a duty of competence on judicial officers *and* an obligation to keep current with technology and to know the benefits and risks associated with all types of technology relevant to service as a judicial officer."[164]

Although this national guidance is helpful, to date, only two states have issued judicial ethics opinions specifically addressing judicial use of AI.

A. Michigan

On October 27, 2023, the State Bar of Michigan issued Ethics Advisory Opinion JI-155, entitled "Judicial Officers Must Maintain Competence with Advancing Technology, Including But Not Limited to Artificial Intelligence."[165] The advisory opinion states that "[j]udicial officers, like lawyers, have an ethical obligation to maintain competence with and further educate themselves on advancing technology, including but not limited to

160. *Id.* at r. 2.5 cmt. 1.

161. *Id.* at r. 2.5 cmt. 2.

162. AI AND THE COURTS: JUDICIAL AND LEGAL ETHICS ISSUES, *supra* note 140.

163. *Id.*

164. *Id.* (emphasis added).

165. *Ethics Advisory Opinion JI-155*, *Judicial Officers Must Maintain Competence with Advancing Technology, Including But Not Limited to Artificial Intelligence*, STATE BAR MICH. (Oct. 27, 2023), https://www.michbar.org/opinions/ethics/numbered_opinions/JI-155.

artificial intelligence."[166] The opinion centers its conclusion on the general duty of competence required of judges, which implicitly requires that "[a]s the use of technology increases, so does the requirement to maintain competence in what is available, how it is used, and whether the use of the technology in question would affect a judicial decision."[167] With respect to AI specifically, the opinion notes that "[t]he increasing use of AI . . . requires judicial officers to understand how these tools will affect their conduct and docket in accordance with [the general duty of competence]."[168]

The advisory opinion goes on to warn that AI can result in everything from inaccurate citations to biased reasoning, but also states that "when, properly used, AI is an asset for the legal community, such as creating accurate content for pleadings and legal summaries, providing efficiency in docket management and legal research, and supplying answers to questions based on algorithms used by technological programs."[169] As JI-155 observes, "AI is becoming more advanced every day and is rapidly integrating within the judicial system, which requires continual thought and ethical assessment of the use, risks, and benefits of each tool."[170] In its conclusion, the opinion reminds readers that being conversant in technology is a key dimension of a judge's duty of competence. It states:

> Judicial officers have an ethical obligation to understand technology, including artificial intelligence, and take reasonable steps to ensure that AI tools on which their judgment will be based are used properly and that the AI tools are utilized within the confines of the law and court rules. Further, as AI rapidly advances, judicial officers have an ethical duty to maintain technological competence and

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*

understand AI's ethical implications to ensure efficiency and quality of justice.[171]

B. West Virginia

West Virginia took a slightly different approach. Rather than focusing on how the judicial duty of competence incorporates a duty of technology competence, as its Michigan counterpart did, West Virginia's Judicial Investigation Commission chose to detail how judges and their clerks should or should not use generative AI in preparing their decisions.[172] The October 13, 2023, opinion begins by affirming the general thrust of the Michigan advisory opinion—that the duty of judicial competence includes the duty to be competent in understanding technologies such as AI. "Judges have a duty to remain competent in technology, including AI. The duty is ongoing."[173] The West Virginia advisory opinion specifically advises judges on their use of AI in preparing judicial opinions. The opinion warns that while "a judge may use AI for research purposes," the judge "may not use it to decide the outcome of a case."[174] "The use of AI in drafting opinions or orders should be done with extreme caution."[175] Among the risks that the opinion identifies with such a use are the dangers of entering confidential case information, or personal information, into a generative AI tool that could find its way into the open environment of the internet, as well as the risk of biased outputs from AI systems.[176]

Both the Michigan and West Virginia judicial ethics opinions emphasize the ethical duty of competence. However, the West Virginia opinion additionally stresses that

171. *Id.*

172. *JIC Advisory Opinion 2023-22*, JUD. INVESTIGATION COMM'N (W. VA.) (Oct. 13, 2023), https://www.courtswv.gov/sites/default/pubfilesmnt/2023-11/JIC%20Advisory%20Opinion%202023-22_Redacted.pdf.

173. *Id.* at 4.

174. *Id.* at 5.

175. *Id.*

176. *Id.* at 4–5.

other ethical obligations impact the judicial use of generative AI. For example, Rule 2.12 of the Model Code of Judicial Conduct sets forth a judge's duty to supervise others, and requires a judicial officer to require court staff, court officials, and even other judges under her supervisory authority (such as on an appellate court with a chief or presiding justice and associate justices) to "act in a manner consistent with the judge's obligations under this Code."[177] In addition, Rule 2.3(B) of the Code states that a judge shall not "by words or conduct manifest bias or prejudice."[178] Multiple state AI policies and rules remind judges that they need to be aware of the potential bias or prejudice inherent in some AI tools due to the use of biased training data or bias in the algorithm. West Virginia's advisory opinion contains similar warnings. It directs judges to "think of AI as a law clerk, who is often responsible for doing a judge's research."[179] Because the "responsibility for the finished product rests solely with the judge," a judge must "check the final draft of any written decision to make sure it contains the most current case law and is error free."[180] The opinion warns judges that an AI tool used in drafting an opinion "may have built in biases or over time may develop perceived biases based on the judge's thought process."[181] Accordingly, the West Virginia opinion urges judges to use "extreme caution" if using AI in drafting opinions.[182]

Yet another ethical obligation raised by West Virginia's judicial ethics opinion and multiple state court AI policies is the duty of confidentiality. Judges must be cognizant of whether they or their staff are entering confidential, sensitive, or legal information into an "open AI system" (such as ChatGPT), in which the AI tool will retain, share, and use the information to train the

177. MODEL CODE OF JUDICIAL CONDUCT r. 2.12 (AM. BAR ASS'N 2020).
178. *Id.* at r. 2.3(B).
179. JIC Advisory Opinion 2023-22, *supra* note 172, at 4.
180. *Id.*
181. *Id.* at 4–5.
182. *Id.* at 4.

model.[183] West Virginia's opinion points out that this risk is particularly heightened in certain types of cases, such as "juvenile or abuse and neglect matters."[184] However, it could also arise in cases involving sensitive business data, proprietary information, or trade secrets. As the West Virginia opinion cautions, "Judges are responsible for ensuring confidentiality and should research the AI product with that in mind and refrain from inputting information that may retain and/or disclose private information."[185]

Looming over the entire conversation of judicial ethics and the use of generative AI, however, is an even more fundamental concern: that it will be the flesh and blood judge who is deciding the case and authoring the opinion rather than an AI tool. There are those who are excited by the prospect of "robot judges." Elon Musk is one.[186] Even some legal scholars appear to welcome a dawning era of "AI authorship," in which "AI tools will be much better at writing what is regarded as a good opinion today rather than predicting what will be most persuasive or laudable years into the future."[187] University of Virginia law professor Richard Re even argues that this drive toward "artificial authorship" will not only improve judicial writing, but decision-making as well:

> AI can and often will improve judicial deliberation. For example, a judge could call upon an AI to brainstorm arguments and counterarguments or to conduct research that parties overlooked. Or the judge could instruct the AI to point out draft prose that has certain problematic features, much as a confident editor or intrepid clerk might "push back" on an errant passage. AI tools may thus increase both the volume and the quality of internal debate among

183. *See id.* at 3–5.

184. *Id.* at 5.

185. *Id.*

186. *See supra* notes 57–58 and accompanying text.

187. *See, e.g.*, Richard Re, *Artificial Authorship and Judicial Opinions*, 92 GEO. WASH. L. REV. 1558, 1588 (2024).

> judges. This result would be to challenge judges' biases, deepen their own views, and enrich their appreciation of competing perspectives.[188]

West Virginia's judicial ethics opinion, however (supported by the chorus of AI policies from multiple states) is adamant that AI must never invade the province or usurp the role of judicial decision-making. As it emphatically states, "A judge should **NEVER** use AI to reach a conclusion on the outcome of a case."[189] AI should never decide the conclusion, because responsibility for a final product like an order or opinion properly rests with the judge. Just as a judicial officer cannot say "the law clerk made me do it," he or she cannot pass the buck to technology and say, "AI made me do it."[190] If a judge does employ AI in the research or even drafting of an opinion, that judge must be extremely cautious and must thoroughly vet the AI's output for accuracy. West Virginia's opinion counsels that as the judge might do with a law clerk, "the judge must decide which way he/she wants to rule and let the program know in advance to ensure that the product conforms with the decision rendered by the judge."[191]

Why is it so critical that the use of generative AI not be allowed to interfere with judicial decision-making? For one thing, maintaining judicial independence, impartiality, and integrity is at the core of a judge's ethical obligations. Rule 2.1 of the Code provides that the duties of judicial office "shall take precedence over all of a judge's" other activities, including any of generative AI.[192] Allowing a judge to be influenced by an AI tool—particularly one that produces results that are biased—would also violate Rule 2.2's requirement that judges

188. *Id.* at 1572.
189. JIC Advisory Opinion 2022-23, *supra* note 172, at 4.
190. *Id.*
191. *Id.* at 5.
192. Model Code of Judicial Conduct r. 2.1 (Am. Bar Ass'n 2020).

must perform their duties with impartiality and fairness.[193]

More fundamentally, Canon 1 dictates that "A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary,"[194] and Rule 1.2 calls for a judge to "act at all times in a manner that promotes public confidence in" these principles.[195] It would erode public trust and confidence in the work that judges do to allow AI to serve as a substitute for actual judgment. While generative AI can assist judges in a myriad of ways, a human judge retains the ultimate responsibility for exercising judgment and—through that exercise—providing justice.

The necessity of upholding this ethical obligation and maintaining public trust will become all the more important as technology advances and as judges hire law clerks and staff attorneys whose recent law school experience includes greater use of and comfort with generative AI. We have already seen a continuing wave of "hallucinations" cases in which self-represented litigants and attorneys have cited completely fabricated cases in their briefs and court filings. More recently, we have also seen that this hallucination trend is not just limited to advocates, but even so-called experts as well. In one New York case in which the expert was opining on damages in a financial dispute, the expert witness's use of an AI tool, Microsoft Copilot, was called into question due to varying results when inputting the same information.[196] Because of this lack of reliability and accuracy, the court found the expert's testimony and opinions "not credible."[197] Even more recently, in a case that ironically involved the dangers of AI (a suit about deepfakes), a federal judge in Minnesota found that the purported expert's citation of

193. *Id.* at r. 2.2.
194. *Id.* at Canon 1.
195. *Id.* at r. 1.2.
196. *In re* Weber, 220 N.Y.S.3d 620, 633 (N.Y. Sur. Ct. 2024).
197. *Id.*

fake sources in his declaration "shatters his credibility with this Court."[198]

If experts' opinions and credibility can be undermined by use of hallucinated sources, imagine what a blow to the public's trust it would be for an appellate court to cite fabricated case citations in one of its opinions. This has not happened yet in a U.S. court, but it has happened abroad. In Brazil, a country whose judicial system has a massive backlog of pending appeals, courts have deployed generative AI in an effort to reduce this logjam.[199] These efforts have involved automating certain decision-making functions and using AI tools to draft the resulting judicial opinions.[200] Perhaps unsurprisingly, this abdication of human responsibility has led to what may be some judge's worst nightmare: an AI-drafted judicial opinion that includes fabricated case citations.[201]

Could such a nightmarish scenario happen in the American civil justice system? As our next section discusses, at least one federal appellate judge sees great potential in the use of generative AI by the appellate judiciary.

V. DOING THE "UNTHINKABLE": JUDGE NEWSOM AND THE FUTURE OF APPELLATE VIEWS ON AI

Appellate judges outside the United States have given the use of generative AI a warmer embrace than their American counterparts. In September 2023, one of

198. Kohls v. Ellison, No. 24-cv-3754, 2025 WL 66514, at *4 (D. Minn. Jan. 10, 2025).

199. Amy Guthrie, *Brazil's Overwhelmed Judiciary, Desperate for Help, Turns to Artificial Intelligence*, LAW.COM (Jan. 16, 2024, 11:04 AM), https://www.law.com/international-edition/2024/01/16/brazils-overwhelmed-judiciary-desperate-for-help-turns-to-artificial-intelligence/.

200. *Id.*

201. *Brazil Judge Investigated for AI Errors in Ruling*, BARRON'S (Nov. 13, 2023, 5:03 PM); https://www.barrons.com/news/brazil-judge-investigated-for-ai-errors-in-ruling-c45e8f8f.

Great Britain's highest ranking appellate judges, Lord Justice Colin Birss, described his use of AI:

> I asked ChatGPT can you give me a summary of this area of law, and it gave me a paragraph. I know what the answer is because I was about to write a paragraph that said that, but it did it for me and I put it in my judgment. It's there and it's jolly useful.[202]

The Lord Justice went on to conclude about AI's potential for the judiciary that "[i]t is useful, and it will be used."[203]

There are signs, however, that American appellate judges may be warming up to the judicial use of generative AI. Speaking at a Federalist Society event at the University of Chicago Law School in March 2024, Judge John Bush of the U.S. Court of Appeals for the Sixth Circuit predicted that AI could aid in the laborious task of researching word usage in historical context for originalist or textualist judges.[204]

Judge Kevin Newsom of the U.S. Court of Appeals for the Eleventh Circuit is one such textualist judge. In a May 2024 concurring opinion, he dared in his own words to make "a modest proposal" regarding appellate use of generative AI and whether an AI large language model (LLM) could assist courts in interpreting insurance policy provisions.[205] Judge Newsom put it as follows:

> Here's the proposal, which I suspect many will reflexively condemn as heresy, but which I promise to unpack if given the chance: Those, like me, who

202. Bianca Castro & John Hyde, *Solicitor Condemns Judges for Staying Silent on 'Woeful' Reforms*, THE LAW SOCIETY GAZETTE (Sept. 14, 2023), https://www.lawgazette.co.uk/news/solicitor-condemns-judges-for-staying-silent-on-woeful-reforms/5117228.article.

203. *Id.*

204. Suzanne Monyak, *AI to Make Originalist Historical Analysis Easier, US Judge Says*, BLOOMBERG LAW (Apr. 1, 2024, 2:55 PM), https://news.bloomberglaw.com/us-law-week/ai-to-make-originalist-historical-analysis-easier-us-judge-says.

205. Snell v. United Specialty Ins. Co., 102 F. 4th 1208, 1221 (11th Cir. 2024) (Newson, J., concurring).

> believe that "ordinary meaning" is *the* foundational rule for the evaluation of legal texts should consider—*consider*—whether and how AI-powered large language models like OpenAI's ChatGPT, Google's Gemini, and Anthropic's Claude might—*might*—inform the interpretive analysis. There, having thought the unthinkable, I've said the unsayable.[206]

Judge Newsom's proposal was issued in a case concerning a personal injury sustained in a fall from an in-ground trampoline. Snell, the insured landscaper who had installed the "ground-level trampoline" in a client's backyard, sought coverage under his commercial general liability policy after the lawsuit was filed.[207] The insurer denied coverage and refused to defend the lawsuit.[208] The district court found that coverage would hinge on whether installation of the trampoline qualified as "landscaping," as that term was used in the policy.[209] However, since the policy did not define the term "landscaping," the court looked at the "common, everyday meaning" of the term and concluded that it did not include trampoline installation.[210] The Eleventh Circuit affirmed, with Judge Newsom concurring.[211]

In his concurrence, Newsom explained that he found dictionary definitions of "landscaping" unhelpful. So, through his law clerk, he asked ChatGPT, "What is the ordinary meaning of 'landscaping?'"[212] Finding the answer he received "more sensible" and "less nutty" than he had anticipated, Judge Newsom plunged forward with his next question: "Is installing an in-ground trampoline 'landscaping?'"[213] The answer he received, which

206. *Id.*
207. *Id.* at 1211.
208. *Id.*
209. *Id.*
210. *Id.* at 1213.
211. *Id.* at 1221.
212. *Id.* at 1224–25 (Newsom, J., concurring).
213. *Id.* at 1225 (Newsom, J., concurring). Judge Newsom posed the same questions to Google's Bard (now Gemini). *Id.* (Newsom, J., concurring).

Newsom included in his opinion, indicated that the trampoline installation Snell had performed might qualify as landscaping.[214]

Judge Newsom continued by providing impressions of the pros and cons of using generative AI tools. On the plus side, he noted that they train on ordinary language "learning" from a vast reservoir of data that actually used understood terms used in everyday life.[215] Since ordinary meaning interpretation "aims to capture how normal people use language in their everyday lives," Newsom observed, the training data of the AI tools made them well-suited for legal textualists.[216] Another plus that Newsom observed was that generative AI tools based on LLMs can "understand" context.[217] They recognize and can discern the difference between the "bat" that is a flying mammal and the "bat" wielded by a baseball player. As Newsom describes, these AI tools are "high-octane language-prediction machines capable of probabilistically mapping, among other things, how ordinary people use words and phrases in context."[218] Two final advantages that Newsom points out is the accessibility of AI and its transparency. Generative AI democratizes the interpretive process, by "leveraging inputs *from* ordinary people and by being available for use *by* ordinary people."[219] Moreover, he added, generative AI "provides judges, lawyers, and litigants an inexpensive research tool."[220]

As far as generative AI's drawbacks are concerned, Judge Newsom led off with the "elephant in the room"—generative AI's propensity for hallucinations.[221] He minimized this downside, however, by emphasizing that

214. *Id.* at 1225 (Newsom, J., concurring).
215. *Id.* at 1226–27 (Newsom, J., concurring).
216. *Id.* at 1227 (Newsom, J., concurring).
217. *Id.* at 1227–28 (Newsom, J., concurring).
218. *Id.* at 1228 (Newsom, J., concurring).
219. *Id.* (Newsom, J., concurring).
220. *Id.* (Newsom, J., concurring).
221. *Id.* at 1230 (Newsom, J., concurring).

judges should not place "blind-faith reliance on LLM outputs" any more than they "would blind-faith rely on a lawyer's representations."[222] Another flaw noted by Judge Newsom is the observation that AI tools "don't capture offline speech, and thus might not fully account for underrepresented populations' usages."[223] He also acknowledges the risk that "[l]awyers, judges, and would-be litigants might try to manipulate" AI tools, using them "strategically to reverse-engineer a preferred answer" by manipulating queries.[224] Finally, Judge Newsom addresses the dystopian fear that excessive reliance on AI will pave the way for "'robo judges' algorithmically resolving human disputes."[225] As Newsom reassures us, he is not suggesting that "any judge should ever query an LLM concerning the ordinary meaning of some word (say, 'landscaping') and then mechanistically apply it to her facts and render judgment."[226] All he is proposing is that judges consider whether generative AI might provide "additional datapoints to be used alongside dictionaries, canons, and syntactical context in the assessment of terms' ordinary meaning."[227] Essentially, Judge Newsom argues that generative AI can be another tool in a jurist's toolbox.

Judge Newsom's concurrence is well-intended and suggests a cautious approach to judicial use of AI, while raising important questions about just how best to engage in such use. At the same time, however, his opinion highlights the glaring need for rules governing judicial use of generative AI. In addition, if we are to take Judge Newsom's experience as an indicator that judicial attitudes toward AI are shifting from indifference or outright hostility to curiosity, a new concern emerges. Does the use of AI resources fall outside the bounds of

222. *Id.* at 1231 (Newsom, J., concurring).
223. *Id.* (Newsom, J., concurring).
224. *Id.* (Newsom, J., concurring).
225. *Id.* at 1232 (Newsom, J., concurring).
226. *Id.* (Newsom, J., concurring).
227. *Id.* (Newsom, J., concurring).

evidentiary rules and judicial guidelines concerning internet investigation?[228]

Judge Newsom used a later concurrence to provide what he called a "sequel of sorts" to his *Snell* opinion.[229] In *United States v. Deleon*, decided in September 2024, the underlying issue was whether a robbery victim was "physically restrained" during the crime; if the victim was "physically restrained," then the U.S. Sentencing Guidelines called for imposing an enhanced sentence on the defendant.[230] At issue was whether "physically restrained" encompassed a cashier being held up at gunpoint by a man (convicted armed robber Joseph Deleon) and separated only by the convenience store counter.[231] Deleon never touched the cashier, but the "physically restrained" enhancement was used to increase his sentence.[232] The Eleventh Circuit panel unanimously affirmed the sentence enhancement, following prior decisions in which the court had interpreted "physically restrained" to encompass such contactless encounters.[233]

Although he concurred with the result, Judge Newsom believed the prior opinions interpreting "physically restrained" were flawed because they misconstrued "the ordinary meaning of that phrase."[234] So, he conducted "a humble little mini-experiment."[235] First, Judge Newsom asked two different generative AI tools—ChatGPT4-o and Anthropic's Claude 3.5 Sonnet—for the meaning of "physically restrained," receiving responses that were largely similar, with only slight variation.[236] He then

228. For an excellent overview of the subject of judicial investigations, see Elizabeth G. Thornburg, *The Curious Appellate Judge: Ethical Limits on Independent Research*, 28 REV. LIT. 133 (2008).

229. United States v. Deleon, 116 F.4th 1260, 1270 (11th Cir. 2024) (Newsom, J., concurring).

230. *Id.* at 1261.

231. *Id.* at 1261–62.

232. *Id.* at 1262.

233. *Id.* at 1265.

234. *Id.* at 1270 (Newsom, J., concurring).

235. *Id.* at 1273 (Newsom, J., concurring).

236. *Id.* at 1271–73 (Newsom, J., concurring).

asked the same question of the three leading AI tools—GPT, Claude, and Google's Gemini 1.5 Flash—ten times each, and found that the responses (provided in the opinion's appendix) echoed the initial results and "coalesce[d], substantively, around a common core—there was an objectively verifiable throughline."[237] Judge Newsom equated these minor variations in the generative AI answers to the kind of differences that would result if one surveyed millions of people about the ordinary meaning of "physically restrained."[238]

Judge Newsom concluded that "an LLM's response reflects its best statistical, probabilistic prediction about the answer to the user's query."[239] He also concluded the largely similar—but not identical—responses underscore the utility of AI tools in ordinary meaning analysis; just as there would be slight variations among humans asked the same question, AI's responses would share a "common core" but not be identical.[240] Toward the end of his concurrence, Judge Newsom noted that AI tools can decipher and explain the meaning of multi-word phrases in a way that standard tools (like dictionaries) cannot.[241] In other words, AI grasps that a phrase can be more than the sum of its parts, while more conventional resources might know what each word independently means, but not what they mean together.

Judge Newsom hastened to add, "No one should mistake my missives for a suggestion that AI can bring scientific certainty to" judicial interpretation.[242] He also was quick to dispel any notion "that we give up on traditional interpretive tools—dictionaries, semantic canons, etc."[243] However, he reaffirmed his belief that AI tools "may well serve a valuable auxiliary role" in determining

237. *Id.* at 1273–75 (Newsom, J., concurring).
238. *Id.* at 1276 (Newsom, J., concurring).
239. *Id.* at 1275 (Newsom, J., concurring).
240. *Id.* at 1276 (Newsom, J., concurring).
241. *Id.* at 1277 (Newsom, J., concurring).
242. *Id.* (Newsom, J., concurring).
243. *Id.* (Newsom, J., concurring).

ordinary meaning. Again, while AI tools may complement an appellate judge's existing resources when it comes to legal interpretation, they should not be viewed as replacements for them.

VI. CONCLUSION

As Chief Justice Roberts observed in his 2023 Year End Report on the Federal Judiciary, judicial work is being affected by generative AI (and not just at the trial level), and its use requires both caution and humility.[244] Generative AI can and should be used by appellate judges, as long as it is used in an ethical and responsible manner. Used in this way, generative AI can support human decision-making—but never replace it. Judge Newsom's concurrences in the *Snell* and *Deleon* cases have been characterized in some circles as a "wake up" call for the judiciary, but if nothing else they represent at least a tacit recognition that AI is here to stay.

Generative AI is the latest technology to revolutionize business, government, and everyday life, so its influence on the work of judges and lawyers comes as no shock. Like attorneys, judges—including appellate judges—must adapt to the efficiencies that proper and safe AI use brings to their workflows, because AI is too powerful to ignore. Simultaneously, judges must remain vigilant about generative AI's limitations and risks—from the dangers of "hallucinations" to bias and to the evidentiary challenges of deepfakes.

Will this happen overnight? Of course not. A recent study by the legal services company Consilio revealed that even among practicing lawyers, the level of AI adoption is not yet as high as once expected.[245] It found that less than one-third of responding law firms and only one-fifth of in-house legal teams are implementing or

244. Roberts, *supra* note 1, at 5.

245. Amanda Robert, *Most Lawyers Aren't Using AI to Address Growing Workloads*, ABA J. (Jan. 16, 2025), https://www.abajournal.com/news/article/most-lawyers-arent-using-ai-to-address-growing-workloads-report-says.

planning to implement AI in their work.[246] The judiciary's embrace of generative AI will almost certainly be more gradual.

To the disappointment of Elon Musk and perhaps others, "robot judges" will not replace human ones. Judges certainly need greater education on the responsible and ethical use of generative AI, because AI can enhance the justice system. However, it can only do so with human oversight, and with policies and rules that govern AI use while aligning with our legal and ethical standards.

246. *Id.*

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NEW GOVERNANCE AND NEW TECHNOLOGIES: CREATING A REGULATORY REGIME FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE COURTS

Raymond H. Brescia[*]

The wide availability of generative artificial intelligence ("GenAI") led at least some to predict the rapid demise of many different professions, including the legal profession. But even as developers introduce newer versions of this technology, and as its use has become more widespread, reports of the demise of these professions—most notably, for this Article's purposes, the legal profession—have been greatly exaggerated. Highly publicized instances of the technology functioning poorly have resulted in pleadings and other legal filings containing fictitious cases and legal authorities. Courts have sanctioned both lawyers and pro se *litigants who have relied upon what has come to be known as GenAI's hallucinatory outputs in their filings before such courts. But at least some courts have determined that it is insufficient to rely on* ex post *sanctions alone to punish those who might improperly rely on the outputs of GenAI. Indeed, some individual judges as well as judicial systems have found it appropriate to issue standing orders and local rules that serve as* ex ante *methods designed to prevent the improper use of GenAI tools; these orders serve as complements to the mechanisms available to judges to sanction litigant misconduct after the fact. This Article is the first to describe these* ex ante *rules and compare the different* ex ante *approaches to the* ex post *mechanisms already available to judges who wish to prevent, punish, and rein in conduct infected by GenAI hallucinations. In addition to providing an analysis of these judicially created* ex ante *rules—which are departures from more established methods that historically enable judges to punish improper litigant conduct—this Article will situate the development of these* ex ante *rules within the field of scholarship addressing regulatory matters often referred to as New Governance Theory. While certainly providing guidance to and oversight of litigants utilizing GenAI, these innovative, decentralized, and experimental judicial approaches also exhibit many of the features of New Governance methodologies. Furthermore, as GenAI*

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continues to play a larger role in the legal profession generally and in litigation particularly, these New Governance approaches may help usher in an era of effective, efficient, and ethical uses of GenAI in litigation—and also provide a roadmap for its effective, safe, and lawful use in other areas as well.

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I. INTRODUCTION

In late November 2022, the introduction of a relatively advanced version of a generative artificial intelligence product, ChatGPT 3.0,[1] led some to predict the rapid demise of many different professions, from journalism[2] and computer programming,[3] to art[4] and law.[5] Roughly two years have elapsed since that potentially disruptive moment in the history of many professions—and, if the technology's

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[1] On the introduction of ChatGPT 3.0, see generally Bernard Marr, *A Short History of ChatGPT: How We Got to Where We Are Today*, FORBES (May 19, 2023, 1:14 AM), https://www.forbes.com/sites/bernardmarr/2023/05/19/a-short-history-of-chatgpt-how-we-got-to-where-we-are-today/ [https://perma.cc/HJV3-Q2M7].

[2] For an argument that GenAI will negatively impact journalism, see generally Caitlin Chin, *Navigating the Risks of Artificial Intelligence on the Digital News Landscape*, CTR. STRATEGIC & INT'L STUD. (Aug. 31, 2023), https://www.csis.org/analysis/navigating-risks-artificial-intelligence-digital-news-landscape [https://perma.cc/7HW4-YZ3S].

[3] On the impact of GenAI on computer programming, see generally Begum Karaci Deniz et al., *Unleashing Developer Productivity with Generative AI*, MCKINSEY DIGITAL (June 27, 2023), https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/unleashing-developer-productivity-with-generative-ai#/ [https://perma.cc/DS22-C7DH].

[4] For an analysis of potential implications of GenAI for the production of art, see generally Elze Sigute Mikalonyte & Markus Kneer, *Can Artificial Intelligence Make Art? Folk Intuitions as to Whether AI-driven Robots Can Be Viewed as Artists and Produce Art*, 11 ACM TRANSACTIONS ON HUMAN-ROBOT INTERACTION 43:1 (2022).

[5] For an analysis of the potential impact of GenAI on the legal profession, see generally THOMSON REUTERS, FUTURE OF PROFESSIONALS REPORT (July 2024), https://www.thomsonreuters.com/content/dam/ewp-m/documents/thomsonreuters/en/pdf/reports/future-of-professionals-report-2024.pdf [https://perma.cc/9E5G-RD62].

main evangelists are to be believed, the history of the human race itself.[6] But even as developers introduce newer versions of this technology, and as its use has become more widespread, to paraphrase Samuel Clemens: The reports of the demise of the professions, including the legal profession, have been greatly exaggerated.[7]

While computer applications using generative artificial intelligence ("GenAI") have certainly entered law practice in several ways,[8] much of the attention to date has focused on highly publicized instances of the technology functioning poorly that resulted in pleadings and other legal filings containing fictitious cases and legal authorities.[9] In these instances, the technology has, in common parlance, "hallucinated."[10] Courts have sanctioned both lawyers and *pro se* litigants who have relied upon GenAI's hallucinatory outputs in their filings.[11] But at least some courts have determined that *ex post* sanctions (whether through Rule 11 of the Federal Rules of Civil Procedure[12] or the courts' inherent powers[13]) punishing those who rely on the outputs of GenAI are not sufficient to ensure those outputs are legitimate legal authorities.[14]

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[6] For arguments that GenAI represents a potential significant leap forward in the history of the human race, see generally Nick Bilton, *Artificial Intelligence May Be Humanity's Most Ingenious Invention—And Its Last?*, VANITY FAIR (Sept. 13, 2023), https://www.vanityfair.com/news/2023/09/artificial-intelligence-industry-future [https://perma.cc/9E5G-RD62].

[7] Cable from Samuel Clemens to the Associated Press, *quoted in* 2 ALBERT BIGELOW PAINE, MARK TWAIN: A BIOGRAPHY 1039 (1912). This quote is itself somewhat exaggerated. Laura I. Appleman, *Reports of Batson's Death Have Been Greatly Exaggerated: How the Batson Doctrine Enforces a Normative Framework of Legal Ethics*, 78 TEMPLE L. REV. 607, 607 n.1 (2005) (describing provenance of this quote and that it is actually a misquote).

[8] For a description of some of the ways in which GenAI has begun to impact the practice of law, see BL, *How Is AI Changing the Legal Profession?* (May 23, 2024), https://pro.bloomberg//law.com/insights/technology/how-is-ai-changing-the-legal-profession [https://perma.cc/43ZH-6DWU].

[9] *See infra* Part I.C.

[10] On GenAI's hallucinations, see GOOGLE, *What Are AI Hallucinations*, https://cloud.google.com/discover/what-are-ai-hallucinations# [https://perma.cc/M662-GE75] (last accessed July 28, 2024).

[11] *See infra* Part I.B.

[12] Fed. R. Civ. P. 11.

[13] Chambers v. Nasco, Inc., 501 U.S. 32, 43–46 (1991) (describing inherent powers of courts, which includes, inter alia, the power to punish litigants for bad faith conduct).

[14] *See infra* Part I.B.

Rather, some individual judges as well as judicial bodies have found it appropriate to issue standing orders and local rules that serve as *ex ante* methods for preventing the improper use of GenAI tools.[15] These orders complement other tools judges have for sanctioning litigant misconduct after the fact. This Article is the first to identify these *ex ante* rules and compare them to *ex post* mechanisms already available to judges who wish to rein in hallucination-infected conduct and deter litigants from abusing GenAI tools.

In addition to providing an analysis of these judicially created *ex ante* rules—which represent a departure from more established methods that historically have enabled judges to punish improper litigant conduct—this Article also situates the emergence of these *ex ante* rules within the field of scholarship addressing regulatory matters often referred to as New Governance. These innovative, distributed, and diffused judicial approaches to discouraging and preventing GenAI abuse exhibit many features of New Governance methodologies. Furthermore, as GenAI continues to play a larger role in the legal profession in general and litigation in particular, these New Governance approaches can help usher in an era of effective, efficient, and ethical uses of GenAI in litigation. They can also provide a roadmap for the effective, safe, and lawful use of GenAI in other areas.

In order to address these issues, this Article proceeds as follows. Part II describes GenAI's introduction into the world generally—with a particular focus on the legal profession. Part II also explains the problem of GenAI hallucinations and describes the instances to date in which courts have punished the improper reliance on GenAI in legal filings. This discussion focuses on how courts use existing tools—which consist exclusively of *ex post* mechanisms—for punishing improper conduct after the fact. This Part also describes the risks that the improper use of GenAI poses to courts, litigants, and the legal system. Part III then provides a typology of the different *ex ante* rules that some individual judges and discrete court systems have put in place to prevent such improper use. It also shows that these approaches are consistent with New Governance Theory. Finally, Part IV offers recommendations for the ways in which these and other New Governance approaches might prove valuable in other areas outside

[15] *See infra* Part II.C.

of the litigation context, where improper reliance on GenAI poses risks.

II. THE INTRODUCTION OF GENAI IN THE PRACTICE OF LAW AND THE JUDICIAL SYSTEM

A. The Emergence of GenAI

The introduction of a new form of artificial intelligence—GenAI—in November 2022 had some calling this new technology a "game-changer" for many industries, including the legal profession.[16] The use of search functions in internet-based and other forms of digital research, driven by better and more focused algorithms since the mid-1990s, is not new.[17] However, such search algorithms typically produced mere hyperlinks that a researcher then had to click on and explore, requiring some degree of analysis, assessment, and synthesis of the information generated by the search.[18] What GenAI does is different: When prompted through a query, one that is more pointed and focused than a typical internet search, this new form of artificial intelligence generates text that is supposed to—in theory—answer the query posed after searching what are known as large language models ("LLMs").[19] GenAI uses a technique sometimes referred to as predictive text, or probabilistic models.[20] By scanning massive amounts of information in an instant, it develops answers to the queries posed

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[16] Owen Morris, *The Transformative Power of Generative AI in the Legal Field*, AM. BAR ASS'N, LAW TECH. TODAY (Sept. 12, 2023), https://www.americanbar.org/groups/law_practice/resources/law-technology-today/2023/the-transformative-power-of-generative-ai-in-the-legal-field/ [https://perma.cc/HU2J-MNBH (staff-uploaded)] (describing generative AI as a "game-changer for the global workforce," including the legal industry).

[17] Eric T. Bradlow & David C. Schmittlein. The Little Engines that Could: Modeling the Performance of World Wide Web Search Engines, 19 MKTG. SCI. 43, 44 (2000).

[18] *See* WEBWISE.IE, *Digital Literacy Skills: Finding Information*, https://www.webwise.ie/teachers/advice-teachers/digital-literacy-skills-finding-information/ [https://perma.cc/4XQE-MM9X] (last visited, July 28, 2024).

[19] Cole Stryker & Mark Scapicchio, *What is Generative AI?*, IBM (Mar. 22, 2024), https://www.ibm.com/topics/generative-ai [https://perma.cc/H79K-EVN7].

[20] Patrick Breen, *Generative AI and What It Means for You*, LEXISNEXIS (May 14, 2023), https://www.lexisnexis.com/blogs/hk-legal/b/thought-leadership/posts/generative-ai-and-what-it-means-to-you [https://perma.cc/5G6B-FZCC].

by predicting what text will typically come next.[21] GenAI then uses this information to generate the answer in a plain-language format.[22] It can also provide the individual creating the prompt with sources for the text and answers generated.[23] The uses of this innovative technology are, at least according to its creators and evangelists, "practically boundless."[24] It certainly can be used to generate new content, summarize large quantities of existing data, and improve or even write computer code.[25] Many predicted—and still predict—that this technology will likely disrupt entire industries and professions, including journalism, computer coding, and the legal profession.[26] The next Section describes some of the potential uses of GenAI in the practice of law.

B. GenAI and the Practice of Law

In late December 2022, Andrew Perlman, dean of Suffolk Law School, posted a paper on the Social Science Research Network that described the newest version of GenAI, ChatGPT-3, as "a state-of-the-art chatbot developed by OpenAI."[27] He argued that this

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[21] Thimothy B. Lee & Sean Trott, *A Jargon-Free Explanation of How AI Large Language Models Work*, ARS TECHNICA (July 31, 2023, 7:00 AM), https://arstechnica.com/science/2023/07/a-jargon-free-explanation-of-how-ai-large-language-models-work/ [https://perma.cc/GU8W-HHRK].

[22] Mikhail Burtsev et al., *The Working Limitations of Large Language Models*, MIT SLOAN MGMT. REV. (Winter 2024), https://sloanreview.mit.edu/article/the-working-limitations-of-large-language-models/ [https://perma.cc/CG33-GNTG].

[23] David Gewirtz, *How to Make ChatGPT Provide Sources and Citations,* ZDNET (June 28, 2024, 3:07 AM), https://www.zdnet.com/article/how-to-make-chatgpt-provide-sources-and-citations/ [https://perma.cc/5YKK-JDQR].

[24] Paul Ricard et al., *Keeping Up with Generative AI*, OLIVER WYMAN, https://www.oliverwyman.com/our-expertise/insights/2023/aug/how-insurers-can-successfully-use-generative-artificial-intelligence.html [https://perma.cc/WW9J-963N] (last visited, July 30, 2024).

[25] Tim Mucci, *Generative AI Use Cases for the Enterprise*, IBM (Feb. 13, 2024), https://www.ibm.com/blog/generative-ai-use-cases/ [https://perma.cc/KCC3-ME7P].

[26] Bethany Cianciolo & Jessica Chia, Opinion, *Here Are the Jobs AI Will Impact the Most*, CNN (Sept. 5, 2023, 10:09 AM), https://www.cnn.com/2023/09/05/opinions/artificial-intelligence-jobs-labor-market/index.html [https://perma.cc/DSA9-LNC6].

[27] Andrew Perlman, *The Implications of ChatGPT for Legal Services and Society,* Suffolk University Law School Research Paper No. 22-14 1 (Rev. Feb. 29, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4294197 [https://perma.cc/FZ6A-T7UT].

technology "has the potential to revolutionize the way legal work is done, from legal research and document generation to providing general legal information to the public."[28] Though the article was posted by Perlman, he produced the paper largely by posing questions to the chatbot. The technology itself, when prompted, described its potential use cases in the legal profession as "[l]egal research," "[d]ocument generation," "[p]roviding general legal information," and "[l]egal analysis."[29] Since Perlman released his paper, many have explored ways to use GenAI to make the work of lawyers more efficient and effective, including in analyzing precedent, synthesizing data, managing lawyer workflows, engaging in predictive analytics, drafting documents and contracts, and summarizing research.[30] Because this technology could provide useful guidance and information to the unrepresented, some hailed the introduction of GenAI as having the potential to close the justice gap by serving those generally underserved by the legal profession.[31]

As John Villasenor recently explained, GenAI is likely to have a more significant impact on the practice of law than other technologies.[32] While many technologies have been introduced into the practice of law over the last few decades, those technologies "were designed to help attorneys efficiently find information that they could then use in formulating and supporting arguments."[33] In contrast, GenAI "can directly contribute to the process of articulating arguments."[34] As a result, according to Villasenor, this technology

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[28] *Id.* at 1–2.

[29] *Id.* at 2–3.

[30] A newly released American Bar Association publication provides an analysis of the role that artificial intelligence will play in the practice of law. *See generally* ARTIFICIAL INTELLIGENCE: LEGAL ISSUES, POLICY, AND PRACTICAL STRATEGIES (Cynthia H. Cwik et al. eds., 2024) [hereinafter AI LEGAL ISSUES].

[31] For an overview of the role that GenAI can potentially play in improving access to justice, see Ray Brescia & James Sandman, *Artificial Intelligence and Access to Justice: A Potential Game Changer in Closing the Justice Gap*, *in* AI LEGAL ISSUES., *supra* note 30, at 187–200.

[32] John Villasenor, *Generative Artificial Intelligence and the Practice of Law: Impact, Opportunities and Risks*, 25 MINN. J. OF LAW, SCI. & TECH. 25, 28 (2024). For an edited volume on the potential impacts of artificial intelligence on the practice of law, see generally AI LEGAL ISSUES., *supra* note 30.

[33] Villasenor, *supra* note 32, at 28.

[34] *Id.*

"impacts a completely different part of the workflow than the storage, search, and information access advances that have been the focus of most of the technology change in the legal profession in recent decades."[35] Moreover, GenAI "can be applied in law in many different ways," including "to accelerate legal research and to produce drafts of text for use in contracts, regulatory filings, court rulings, academic papers, wills, trusts, patent specifications, affidavits, articles of incorporation, and more."[36]

C. New Technologies' Hallucinations and the Initial Judicial Response

Some predicted that GenAI threatened to undermine, if not completely displace, the work of lawyers in many different areas.[37] But those who preached caution when it came to the widespread use and adoption of GenAI in the practice of law would soon have ample evidence that reliance on GenAI by lawyers and non-lawyers alike posed significant risks due to the potential to produce inaccurate results, or "hallucinations."[38] Indeed, once journalists and others identified that GenAI chatbots can produce inaccurate, if not outright bizarre, results, it became apparent that this new technology was perhaps not the disruptive force in relation to the legal profession that some were predicting.[39] Not long after *New York Times* journalist Kevin Roose revealed the disturbing responses he received from a GenAI chatbot, including its profession of love for Roose and the suggestion that Roose leave his spouse for the bot,[40] news broke that a group of

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[35] *Id.*

[36] *Id.* at 31.

[37] *See* THOMSON REUTERS, *supra* note 5 (describing potential impacts of AI on the practice of law).

[38] For a recent analysis of the hallucination rate of even the more specific large-language models created by the leading legal research providers, see VARUN MAGESH ET AL., HALLUCINATION-FREE? ASSESSING THE RELIABILITY OF LEADING AI LEGAL RESEARCH TOOLS (2024), https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf [https://perma.cc/3SPV-NEKV].

[39] Richard Tromins, *The End of Lawyers? Not Yet*, ARTIFICIAL LAWYER (May 16, 2023), https://www.artificiallawyer.com/2023/05/16/the-end-of-lawyers-not-yet/ [https://perma.cc/NE3Q-YP3F] (last visited July 31, 2024).

[40] Kevin Roose, *A Conversation with Bing's Chatbot Left Me Deeply Unsettled*, N.Y. TIMES (Feb. 16, 2023), https://www.nytimes.com/2023/02/16/technology/bing-chatbot-microsoft-chatgpt.html [https://perma.cc/XC22-E7KL (staff-uploaded,

lawyers had submitted legal filings citing authorities produced by GenAI that, it turned out, had no basis in law. They were completely fictitious, and, as the next Section shows, led to significant consequences for the lawyers involved.

D. Ex Post *Punishments for Improper Use of GenAI*

In *Mata v. Avianca*,[41] the plaintiff's lawyers in a personal injury action submitted their opposition to a motion to dismiss and included cases in their filings that those lawyers found using ChatGPT.[42] Such cases appeared to support the plaintiff's position and allegedly warranted denial of the defendants' motion.[43] According to the testimony provided by one of the lawyers who had utilized the technology as part of the chatbot-assisted research, the lawyer used a range of prompts directed at the technology, including the following: "provide case law," "show me specific holdings," "show me more cases," and "give me some cases."[44] As the trial court found upon a review of the process the lawyer used in conducting his research and locating cases in support of his position, "the chatbot complied by making them up."[45] Making matters worse, one of the lawyers claimed he posed additional queries to the chatbot, asking it whether the cases were legitimate—which the technology confirmed.[46] After conducting its inquiry into the lawyers' behavior and their explanations for why they had submitted these fictitious cases, the court found that the lawyers had not only inappropriately relied on the technology in their presentation of their opposition to the motion, but they had also not been wholly forthcoming when describing their actions.[47] Accordingly, the trial court sanctioned the lawyers who had engaged in these actions

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dark archive)]. The entirety of the conversation between Roose and the chatbot can be found here: Kevin Roose, *Bing's A.I. Chat: 'I Want to Be Alive.* 😈', N.Y. TIMES (updated Feb. 17, 2023), https://www.nytimes.com/2023/02/16/technology/bing-chatbot-transcript.html [https://perma.cc/6WDQ-EYW9 (staff-uploaded, dark archive)].

[41] 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

[42] *Id.* at 456

[43] *Id.*

[44] *Id.* at 457.

[45] *Id.*

[46] *Id.* at 458.

[47] *Id.* at 461–66.

under both Rule 11 of the Federal Rules of Civil Procedure and the court's inherent powers.[48]

Despite the attention the *Mata* case generated, both lawyers and *pro se* litigants have continued to exhibit misplaced reliance on the product of GenAI tools, and courts continue to issue sanctions for such conduct after the fact.[49] More recently, the Court of Appeals for the Second Circuit had the opportunity to review an attorney's filings that cited a nonexistent case, with the attorney claiming that she had found the authority using GenAI.[50] According to the lawyer's explanation: ChatGPT, on which the attorney relied, had "previously provided reliable information, such as locating sources for finding an antic [sic] furniture key. The case [the lawyer cited] . . . was suggested by ChatGPT."[51] The Second Circuit found that, "at the very least," the duties imposed on lawyers by Rule 11 of the Federal Rules of Civil

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[48] *Id.* at 465.

[49] *See, e.g.*, Thomas v. Metro. Transp. Auth., No. 22-2659-CV, 2024 WL 1107841 (2d Cir. Mar. 14, 2024) (affirming dismissal of *pro se* plaintiff's complaint containing broad and conclusory allegations under Rule 12(b)(6) for failure to state a claim after twice affording them the opportunity to amend the briefing issues identified by the district court including fabricated or hallucinated citations to authority); Froemming v. City of W. Allis, No. 23-2380, 2024 WL 261315 (7th Cir. Jan. 24, 2024) (affirming district court's denial of *pro se* motion containing baseless claims unsupported by legal authority and granting defendant's motion for Rule 38 monetary sanctions in the amount of $5,000 for frivolous filings containing numerous citations to cases that do not exist and false quotations from the one's that do); Whaley v. Experian Info. Sols., Inc., No. 3:22-CV-356, 2023 WL 7926455 (S.D. Ohio Nov. 16, 2023) (dismissing claim without prejudice and granting leave to amend unclear and potentially frivolous complaint which *pro se* litigant admitted was a result of artificial intelligence use to prepare case filings); Morgan v. Cmty. Against Violence, No. 23-CV-353-WPJ/JMR, 2023 WL 6976510 (D.N.M. Oct. 23, 2023) (dismissing multiple claims with or without prejudice and granting *pro se* plaintiff leave to file an amended complaint while warning them that future filings with citations to fake or nonexistent cases will result in Rule 11 sanctions); Taranov v. Area Agency of Greater Nashua, No. 21-CV-995-PB, 2023 WL 6809637 (D.N.H. Oct. 16, 2023) (dismissing *pro se* action under Rule 12(b)(6) for failure to state a claim without prejudice and finding such claim meritless and unsupported by irrelevant and mostly nonexistent case law); Esquivel v. Kendrick, No. 22-50979, 2023 WL 5584168 (5th Cir. Aug. 29, 2023) (denying appeal and affirming district court's dismissal of *pro se* plaintiff's claim as substantive arguments were raised for the first time on appeal with citations to nonexistent authority).

[50] Park v. Kim, 91 F.4th 610 (2d Cir. 2023).

[51] *Id.* at 614. The lawyer "wish[ed] to clarify that [she] did not cite any specific reasoning or decision from this case." *Id.*

Procedure "require that attorneys read, and thereby confirm the existence and validity of, the legal authorities on which they rely."[52] The Second Circuit went on to refer the attorney to the court's grievance panel because the reliance on "non-existent authority reveal[ed]" that the attorney "failed to determine that the argument she made was 'legally tenable,' " as she presented a "false statement of law to [the] [c]ourt" and "made no inquiry, much less the reasonable inquiry required of Rule 11 and long-standing precedent, into the validity of the arguments she presented."[53]

In another case out of the Southern District of New York, District Judge Jesse Furman declined to sanction the lawyer representing defendant Michael Cohen[54] for reliance on cases supplied to the lawyer by Cohen.[55] In conducting research to aid his attorneys, Cohen used the GenAI tool Google Bard when conducting research to support his position.[56] The lawyer was unaware that, after back and forth between several attorneys, the cases ultimately cited in the brief came from a GenAI application.[57] The district court found that the lawyer's "citation to non-existent cases [was] embarrassing and certainly negligent, perhaps even grossly negligent. But the Court [could not] find that it was done in bad faith," and thus did not impose sanctions on the lawyer.[58] Similarly, the district court considered whether to sanction Cohen himself. In declining to do so, the court found that "it would have been downright irrational" for Cohen to have provided fake cases to his attorney "knowing they were fake—given the probability that [the lawyer] would discover the problem himself and not include the cases in the motion . . . [or] that the issue would be discovered by the Government or Court, with potentially serious adverse consequences for Cohen himself."[59]

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[52] *Id.* at 615.

[53] *Id.* (citations omitted).

[54] Colby Hamilton, *Michael Cohen Officially Disbarred in New York State*, N.Y.L.J. (Feb. 26, 2019) https://www.law.com/newyorklawjournal/2019/02/26/cohen-officially-disbarred-in-new-york-state/ [https://perma.cc/NZ69-8W62] (describing Cohen as "former attorney and fixer to Donald Trump").

[55] United States v. Cohen, No. 18-CR-603, 2024 WL 1193604 *6 (S.D.N.Y. Mar. 20, 2024).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

While the cases described here have all involved attorneys (and one former attorney), there have also been a number of cases in which courts have noted that GenAI was used by *pro se* litigants.[60] Most of those cases do not address those uses directly. Nor have courts appeared to issue sanctions against such litigants for their use of those tools. The one case that did, *Kruse v. Karlen*,[61] involved a worker who successfully sued for back wages from her former employers.[62] One of the defendants in that case appealed the ruling and utilized GenAI to prepare his filings before the appellate court. In those filings, the appellate court noted:

> Appellant submitted an Appellate Brief in which the overwhelming majority of the citations are not only inaccurate but entirely fictitious. Only two out of the twenty-four case citations in Appellant's Brief are genuine. The two genuine citations are presented in a section entitled Summary of Argument without pincites and do not stand for what Appellant purports.[63]

The court ultimately went on to award partial attorney's fees to the plaintiff-respondent because the appellant's actions "required Respondent to expend more resources than necessary to decipher the record and arguments" and "identify the fictitious cases Appellant wrongly presented to [the] [c]ourt" when the respondent's appeal "wholly lacked merit."[64]

E. A Typology of the Threats that GenAI Poses to the Legal System

As described above, GenAI holds some promise for narrowing the justice gap and for making legal practice more efficient and effective.[65] At the same time, it is quite clear that GenAI has not reached the level where a lawyer or *pro se* litigant should or could rely on the outputs produced by this technology when preparing legal filings.[66] Moreover, the instances where litigants have relied on these outputs to their detriment have led to the imposition of a range of sanctions.[67] The legal system, and individual litigants in particular, must approach the use of GenAI with great caution. One might find oneself submitting

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[60] *See* collected cases cited *supra* note 49.
[61] *Kruse v. Karlen*, 692 S.W.3d 43 (Mo. Ct. App. 2024).
[62] *Id.* at 47–49.
[63] *Id.* at 48–49.
[64] *Id.* at 54.
[65] *See supra* Part II.B.
[66] *See supra* Part II.C.–D.
[67] *See supra* Part II.D.

court filings containing nonexistent authorities—the product of GenAI hallucinations. This Subpart lays out the dangers that the unbridled use of GenAI in legal filings poses to the courts and the litigants who function within them. In response to these dangers, courts have begun to craft complementary rules designed to provide another layer of protection that might discourage litigants from the improper use of GenAI in their court filings.[68]

In Judge Castel's opinion issuing sanctions in *Mata*, he described some of the harms that GenAI can cause when used improperly in litigation:

> Many harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity.[69]

Indeed, one of the primary threats that GenAI poses to the functioning of court systems is that—when the technology hallucinates and litigants submit error-ridden pleadings and court filings based on those hallucinations—judges, court staff, and adversaries will waste time and energy checking the validity of the fictitious sources submitted, which could serve as the basis for legal arguments and claims.[70]

Related to these threats, it is likely that GenAI will empower more aggressive litigants to multiply their filings in both length and complexity. Some *pro se* litigants throughout the American court system already submit prolix filings, asserting that the American income tax system is unconstitutional or that they are "sovereign citizens" not subject to the jurisdiction of any domestic legal system.[71]

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[68] *See infra* Part III.C. (describing these rules in detail).

[69] Mata v. Avianca, 678 F.3d. 443, 448–49 (S.D.N.Y. 2023) (footnote omitted).

[70] *See id.*

[71] The sovereign citizens movement has been described as "an utterly frivolous attempt to avoid the statutes, rules, and regulations that apply to all litigants." Mells v. Loncon, No. CV418-296, 2019 WL 1339618, at *2 (S.D. Ga. Feb. 27, 2019) (emphasis omitted). As one court has explained, "[a] so-called 'sovereign citizen'

Similarly, prisoners and detainees sometimes file lengthy *pro se* pleadings articulating highly dubious claims.[72] Even before the introduction of GenAI to *pro se* litigants, these litigants often found ways to submit outlandish claims, burdening court systems.[73] Now, *pro se* litigants in various contexts could rely on the product of GenAI tools to further amplify and multiply their pleadings, creating an even greater burden on the courts and the litigants who might appear as adversaries.[74]

Admittedly, *pro se* litigants who might seek to weaponize the legal system in the ways described in the previous paragraph might represent a small fraction of all litigants who file cases or defend themselves in litigation. Still, with *pro se* litigants—or even those represented by

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generally relies 'on the Uniform Commercial Code ("UCC"), admiralty laws, and other commercial statutes to argue that, because he has made no contract with [the court or government], neither entity can foist any agreement upon him.'" Pitts v. Smith, No. 22-CV-00162, 2022 WL 18832251, at *3 (M.D. Ga. Dec. 28, 2022) (alteration in original) (citation omitted); *see also* Trevino v. Florida, 687 F. App'x 861, 862 (11th Cir. 2017) (per curiam) (finding sovereign citizen arguments frivolous and "clearly baseless").

[72] In the 1990s, Congress passed several statutes designed to rein in what it saw as frivolous litigation by prisoners. As the court explained in *Walker v. O'Brien*:

> The passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub.L. No. 104–132, 110 Stat. 1214 (1996), and the Prison Litigation Reform Act (PLRA), Pub.L. No. 104–134, § 801 et seq., 110 Stat. 1321–66 (1996), which became effective on April 24, 1996 and April 26, 1996, respectively, ushered in a new and far more restrictive era for prisoner litigation. A critical feature of both statutes was the creation of gatekeeping mechanisms designed to keep frivolous suits out of the federal courts.

216 F.3d 626, 628 (7th Cir. 2000). That is not to say that all prisoner cases are frivolous, unlike the claims made by so-called sovereign citizens, and courts must take care not to paint such prisoner cases with too broad a brush. *See, e.g.*, Hernandez v. Denton, 861 F.2d 1421, 1430–33 (9th Cir. 1989) (Aldisert, J., concurring in part and dissenting in part) (describing importance of courts balancing out need to manage frivolous prisoner cases efficiently while preserving the ability of meritorious prisoner cases to go forward). For an overview of trends in inmate litigation generally, see *Margo Schlanger, Inmate Litigation,* 116 HARV. L. REV. 1555 (2003).

[73] *See, e.g.*, Muhammad v. Smith, No. 13-CV-760, 2014 WL 3670609, at *2 (N.D.N.Y. July 23, 2014) ("Theories presented by redemptionist and sovereign citizen adherents have not only been rejected by courts, but also recognized as frivolous and a waste of court resources.").

[74] *See, e.g.*, *supra* text accompanying notes 60–64 (describing *pro se* litigants' use of GenAI).

counsel who attempt to conduct their own legal research—using GenAI might give them a false sense of the strengths (or weaknesses) of their legal claims. This might lead them to press their claims under a misguided sense of their legal positions' validity. What is more, in courts with even fewer resources than the federal courts, it will be markedly harder for judges and adversaries—who might be *pro se* themselves—to double-check the work submitted by litigants relying on GenAI. If an overburdened judge is unable to check citations and a *pro se* adversary is unable to rigorously review them (as is necessary in the adversarial system), then it is quite possible that a fictitious case might make its way into the legal bloodstream. A judge might cite one of these cases as binding authority, thereby transmogrifying such fictitious authorities into legitimate ones.

In *Mata*, the court appended the fictitious cases cited by the plaintiff's lawyers.[75] But, without the ability to conduct thorough research on the legitimacy of those opinions, one would be hard-pressed to determine that those opinions were fictitious. In courts where otherwise unreported cases are often appended to briefs by litigants,[76] it is possible that courts might soon inadvertently rely on such opinions as useful, if not binding, authority.

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This Section has outlined some of the *ex post* interventions that courts have utilized to sanction litigants who have used GenAI carelessly, if not maliciously. As one purpose behind the court's sanctioning powers is to deter future inappropriate behavior, the punishments likely meted out by courts in these cases will have some deterrent effect. At the same time, if courts are to look at the harms that improper reliance on fictitious authorities threatens to cause, punishment after the fact—apart from its deterrent effect in other cases—is unlikely to prevent at least some of those harms, especially the wasting of court and litigant time. As the next Section explores, courts are beginning to examine ways to create *ex ante* interventions

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[75] The appendix to the court's decision in *Mata*, which contains the text of the fictitious opinions, can be found at 678 F. Supp. 3d at 467–75.

[76] *See, e.g.*, PA. R. APP. P. R.126(a) ("A party citing authority that is not readily available shall attach the authority as an appendix to its filing. When citing authority, a party should direct the court's attention to the specific part of the authority on which the party relies.").

that might prevent the improper use of GenAI tools. Moreover, these approaches align well with what is known as New Governance Theory. The discussion will now turn to these phenomena.

III. *EX ANTE* JUDICIAL RESPONSES TO GENAI AS EXAMPLES OF NEW GOVERNANCE APPROACHES TO REGULATING BEHAVIOR

This Part will explore some of the interventions that court systems, and even some individual judges, are deploying to rein in the improper use of GenAI tools in litigation. These interventions bear the hallmarks of regulatory approaches—clustered under the approach to regulatory oversight—that has come to be known as New Governance Theory. This Part first describes New Governance Theory and shows that its features are common in both oversight of the legal profession in general and the rules that govern civil litigation. Then, this Part offers a typology of the various *ex ante* interventions that courts and judges are deploying to deter the improper use of GenAI tools in civil litigation. Finally, this Part shows how such interventions align well with New Governance approaches and the benefits that might emerge.

A. The Emergence of New Governance Models to Regulate Behavior in Dynamic Settings

New Governance approaches begin with the premise that key stakeholders in any field subject to regulation—including regulators, the regulated, and those protected by such regulation—should participate in crafting the regulatory regime that should both shape and control behavior within it.[77] Contrasted with the "top-down" system of command-and-control regulation, New Governance models strive to create flexible, adaptable, and bottom-up systems, fostering greater buy-in and support among the regulated and the beneficiaries of such regulation. This occurs largely because the interests of all critical stakeholders are considered, from the development of such regimes to the enforcement phase. This creates an informational feedback loop

[77] For an overview of New Governance Theory, see, for example, IAN AYRES & JOHN BRATHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (Donald R. Harris et al. eds., 1992); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentation*, 98 COLUM. L. REV. 267 (1998).

that allows for modification of the regime: As the elements of the regime face reality on the ground, they incorporate changes that might occur in a given regulated environment.[78]

The New Governance approach represents democratic, participatory, and representative ideals.[79] Instead of relying solely on the expertise of lawmakers and coercive, punitive regulatory techniques, New Governance processes welcome the insights and experience of regulated entities, domain experts, and consumers—whose unique perspectives do not typically inform traditional rulemaking processes.[80] This spirit of openness is further advanced by non-coercive methods of oversight that privilege "soft-law" models, including a stated preference for self-regulation and disclosure-based regulatory systems as opposed to more invasive "hard-law" oversight

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[78] As Orly Lobel has explained, some common features of New Governance models include increased stakeholder participation, public-private collaboration, decentralized decision making and rule generation, a preference for soft-law approaches, and adaptability. Orly Lobel, *New Governance as Regulatory Governance*, *in* OXFORD HANDBOOK OF GOVERNANCE 66, 66–67 (David Levi-Four, ed., 2012) (reference omitted).

[79] For the argument that New Governance approaches promote these ideals, among others, see, for example, Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344–45 (2004) [hereinafter Lobel, *Renew Deal*] ("The new governance model supports the replacement of the New Deal's hierarchy and control with a more participatory and collaborative model, in which government, industry, and society share responsibility for achieving policy goals. The adoption of governance-based policies redefines state-society interactions and encourages multiple stakeholders to share traditional roles of governance."); Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 357, 382–84 (2010) (describing how two different sources of New Governance Theory converse with one another in the contemporary scholarship); Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239, 239 (2010) (examining whether the proliferation of "experiments in policy, program structure, and governance frameworks" in state welfare programs resulted in the intended impact: one that was "more deeply accountable to individuals and communities").

[80] On the importance of the perspectives of non-traditional actors in the rulemaking process, see Lobel, *Renew Deal*, *supra* note 79, at 371–76; Michael Blasie, *A Separation of Powers Defense of Federal Rulemaking Power*, 66 N.Y.U. ANN. SURV. AM. L. 593, 597–98 (2011) (discussing this theme within the context of Federal Judicial Rulemaking specifically).

regimes.[81] What is more, flexible, non-coercive regulatory mechanisms encourage experimentation and create important feedback loops that allow the incorporation of information to reshape the regulatory landscape.[82] A New Governance approach is entrepreneurial because it "identif[ies] its customers, determin[es] their needs, and mov[es] forward to identify the best practices that would meet these needs."[83] In the end, the "organizing principles" of New Governance approaches include "flexibility, competition, adaptability, and learning."[84]

Another aspect of New Governance approaches that helps spur experimentation and create feedback loops is that decision-making is often decentralized and pluralistic so that any regulatory regime is responsive to the potentially diverse needs of local stakeholders.[85] Because of their flexibility and responsiveness to feedback loops and the potential for facts to change on the ground, New Governance approaches are particularly well-suited to settings that are either subject to change or evolving. This is especially true in areas where technological change is likely to outpace the ability of regulators to keep up with such change.[86] Having adaptable and responsive regulatory systems helps to encourage experimentation by the

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[81] *See, e.g.*, Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 529–32 (2009) (comparing "soft-" and "hard-law" approaches in New Governance scholarship).

[82] Dorf & Sabel, *supra* note 77, at 287–288.

[83] Lobel, *Renew Deal*, *supra* note 79, at 366.

[84] *Id.* at 366–67.

[85] On the role of decentralized rulemaking in New Governance Theory, see Lance Gable, *Evading Emergency: Strengthening Emergency Responses Through Integrated Pluralistic Governance*, 91 OR. L. REV. 375, 419 (2012) (citing Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, *in* THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 1, 1–14 (Lester M. Salamon ed., 2002)); Lobel, *Renew Deal*, *supra* note 79, at 344.

[86] On the benefits of New Governance approaches in dynamic settings, see Dorf & Sabel, *supra* note 77, at 315 ("A central lesson of the limitations of New Deal institutions is that effective government services and regulations must be continuously adapted and recombined to respond to diverse and changing local conditions, where local may mean municipal, county, state, or regional as the problem requires.").

regulators and the regulated, fostering an entrepreneurial approach and supporting innovation while also working to prevent consumer harm.[87]

New Governance approaches have proliferated in a number of different contexts, such as occupational safety and health, securities regulation, and employment discrimination.[88] In the context of federal rulemaking, when federal agencies engage in the formal processes under the Negotiated Rulemaking Act,[89] they are foregoing the traditional model of federal rulemaking for a more open, flexible, and inclusive process that exhibits the hallmarks of New Governance approaches.[90] As Orly Lobel explained, some common features of New Governance models include increased stakeholder participation, public-private collaboration, decentralized decision-making and rule-generation, a preference for soft-law approaches, and adaptability.[91] For the following discussion concerning the New Governance features of legal ethics rules and oversight of civil litigation, some elements of particular relevance include stakeholder engagement in rulemaking,[92] a degree of self-regulation and oversight,[93] disclosure-based and information-forcing mechanisms,[94] decentralized rulemaking and

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[87] *See* Dorf & Sabel, *supra* note 77, at 314–23 (describing the importance of experimentation in New Governance models); Victoria Nourse & Gregory Shaffer, *Empiricism, Experimentalism, and Conditional Theory*, 67 SMU L. REV. 141, 166–77 (2014) (examining the experimentalism reflected in the New Governance movement as one of two complementary strands of the New Legal Realism movement); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 78–89 (2011) (identifying the influence of experimentalism in policymaking contemporary to the time of publication).

[88] Jaime Alison Lee, *"Can You Hear Me Now?": Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL'Y REV. 405, 411 (2013) (citations omitted).

[89] 5 U.S.C. §§ 561–70

[90] *See id.*

[91] Lobel, *supra* note 78, at 66.

[92] On stakeholder engagement in New Governance Theory, see AYRES & BRAITHWAITE, *supra* note 77, at 82 ("An opportunity for participation by stakeholders in decisions over matters that affect their lives is a democratic good independent of any improved outcomes that follow from it.").

[93] On the frequent role of self-regulation in New Governance regulatory models, see generally Jason M. Solomon, *New Governance, Preemptive Self-Regulation, and the Blurring of Boundaries in Regulatory Theory and Practice*, 2010 WIS. L. REV. 591 (2010).

[94] For a description of disclosure-based mechanisms common in New Governance approaches, see Ruth Jebe, *Sustainability Reporting and New Governance: South Africa Marks the Path to Improved Corporate Disclosure*, 23 CARDOZO J. INT'L & COMP. L. 233, 247–64 (2015).

oversight,[95] and experimentation.[96] This Part's focus now shifts to these features of lawyer regulation and civil litigation.

B. New Governance, the Legal Profession, and Civil Litigation

1. New Governance and Oversight of the Legal Profession

The system for regulating the legal profession that has emerged over the last 150 years exhibits components that suggest it aligns well with New Governance Theory, including that it incorporates self-regulation, experimentation and decentralization, stakeholder engagement, and soft-law models.[97] Each of these features are described, in turn, below.

The regulatory model that the profession has developed over nearly the last two centuries is mostly one based on self-regulation, a common feature of New Governance approaches.[98] Prior to the creation of written codes of ethics in the late nineteenth century,[99] an extremely modest system based almost exclusively on the maintenance of lawyer reputation among the bench and bar was supposed to "regulate" attorney misconduct.[100] By century's end, states began to promulgate codes of conduct, and the American Bar Association ("ABA") created the Canons of Professional Ethics in 1908 and encouraged state bars and court systems to follow suit.[101] To this day,

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[95] For more on decentralized decision making in New Governance Theory, see Abbott & Snidal, *supra* note 81, at 524–28.

[96] On more on the role and importance of experimentation to New Governance models, see Dorf & Sabel, *supra* note 77, at 314–23; *see also* Nourse & Shaffer, *supra* note 87, at 166–77.

[97] Raymond H. Brescia, *Regulating the Sharing Economy: New and Old Insights into an Oversight Regime for the Peer-to-Peer Economy*, 95 NEB. L. REV. 87, 113–31 (2016). For a description of the ways in which the rules that govern the legal profession exhibit features of New Governance Theory, see *id.* at 135.

[98] *See* Solomon, *supra* note 93, at 622–24 (identifying the role of self-governance in New Governance Theory).

[99] On the first lawyers' codes of ethics, see generally Ray Brescia, Lawyer Nation: The Past Present, and Future of the American Legal Profession 72 (2024).

[100] On early efforts to promulgate ethical guidance for lawyers, which sometimes read like rules of etiquette rather than codes of conduct, see *id.* at 69–72.

[101] Am. B. Ass'n, *The Canons of Professional Ethics*, FINAL REPORT OF THE COMMITTEE ON CODE OF PROFESSIONAL ETHICS, 31 ANN. REP. A.B.A. 567, 568–72 (1908); *see also* RICHARD ABEL, AMERICAN LAWYERS 46 (1989) (noting ABA had

the self-regulatory features of the oversight of attorney conduct include the passage of codes of ethics and the imposition of responsibilities on supervisory lawyers to install appropriate systems in law offices to ensure ethical conduct.[102] In addition, lawyers have an affirmative duty to report other lawyers who exhibit behavior that raises "substantial question[s]" regarding those lawyers' fitness to practice law.[103] First, self-regulation of the legal profession is necessary because only those trained in the practice of law can understand the responsibilities of the profession and impose rules on that profession.[104] Second, lawyers require a degree of freedom from intrusion into their practice so that they may engage in zealous advocacy on behalf of clients.[105]

A second core feature the legal profession's oversight regime is that it is both decentralized and at least somewhat experimental, with standards evolving at the national level for adoption and adaptation by regulatory bodies at the state level.[106] Generally speaking, the ABA promulgates model rules for consideration at the state level, either by court systems or bar associations.[107] The ABA, though, has no authority to force state courts or state bar associations to adopt its model rules, so state regulatory bodies are free to set their own rules,

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no power to enforce its own recommendations as they related to the Canons of Professional Ethics and later efforts to impose stricter accreditation requirements on law schools).

[102] MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS'N 2020) (noting duties of supervisory lawyers); *id.* r. 5.3 (outlining supervisory duties of lawyers toward non-lawyer staff).

[103] *Id.* r. 8.3 (imposing affirmative duty to report misconduct by another lawyer when such conduct raises substantial questions of a lawyer's fitness to practice law).

[104] For an overview of the justifications for lawyer independence, see generally Robert W. Gordon, *The Independence of Lawyer*s, 68 B.U. L. REV. 1 (1988).

[105] On lawyer independence, see Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued*, 46 AKRON L. REV. 599, 610 (2013). *See generally* Gordon Turriff, *The Importance of Being Earnestly Independent*, 2012 MICH. ST. L. REV. 281 (2012).

[106] For a history of the adoption of attorney codes of conduct, see Leonard M. Niehoff, *In the Shadow of the Shrine: Regulation and Aspiration in the ABA Model Rules of Professional Conduct*, 54 WAYNE L. REV. 3, 6–11 (2008).

[107] Robert J. Ambrogi, *Tech Competence: 40 States Have Adopted the Duty of Technology Competence*, LAWSITES, http://www.lawnext.com/tech-competence [https://perma.cc/29GR-VUXM] (last visited July 29, 2024) (discussing the role of the Model Rules and state adoption).

tinker with the ABA's recommended rules, or adopt them *verbatim*.[108] This diffusion of rulemaking allows for a degree of experimentation, which can occur sometimes at the margins or in more significant ways.[109] Moreover, at present, several states are explicitly engaging in experimental approaches to regulatory oversight by creating so-called "regulatory sandboxes" that give entities greater leeway to explore novel approaches in discrete areas of regulation, such as authorizing the creation of new business models.[110]

A diverse range of stakeholders—including the practicing bar, members of the bench, academics, and, to a lesser extent, consumers—participate in rulemaking and enforcement of the rules.[111] As described above, the ABA makes recommendations to the states concerning model rules that are themselves generated through discussion, debate, and public comments at the national level, including ABA leadership and various stakeholders within the legal community.[112] A similar array of stakeholders are typically involved in the debates around promulgating state rules.[113] Though consumers of legal services have not played a significant role in the rulemaking process, some states

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[108] Devin S. Mills & Galina Petrova, *Modeling Optimal Mandates: A Case Study on the Controversy over Mandatory Professional Liability Coverage and its Disclosure*, 22 GEO. J. LEGAL ETHICS 1029, 1032 n.22 (2009) (noting authority of states to modify rules suggested by the ABA).

[109] Charles W. Wolfram, *Parts and Wholes: The Integrity of the* Model Rules, 6 GEO. J. LEGAL ETHICS 861, 901 (1993) (describing areas in which states have engaged in some degree of rule-based experimentation).

[110] *See* Ralph Baxter, *Dereliction of Duty: State Bar Inaction in Response to America's Access-to-Justice Crisis*, 132 YALE L.J. F. 228, 254–56 (Oct. 19, 2022) (quotation omitted) (describing the concept of ethical sandboxes).

[111] Jaime Alison Lee, *"Can You Hear Me Now?": Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL'Y REV. 405, 406 (2013) (describing as a "core principle" of New Governance Theory "a commitment to decentralized problem solving by local stakeholders, and the ongoing adjustment of rules and policies informed by on-the-ground monitoring and feedback").

[112] *See* Michael Ariens, *The Last Hurrah: The Kutak Commission and the End of Optimism*, 49 CREIGHTON L. REV. 689, 697–721 (2016) (describing the legislative history of the development of the ABA's Model Rules of Professional Conduct).

[113] *See., e.g.*, Judith S. Kaye, *New York State Bar Association Report of the Task Force on Nonlawyer Ownership,* 76 ALB. L. REV. 865 (2013) (noting development of public comments on a proposed rule, but listing membership of task force as exclusively lawyers, law professors, and members of the state bench).

have begun to incorporate the voices of diverse community representatives in discussions around the adoption of state rules.[114]

Finally, when rules are actually adopted at the state level, they tend to appear more like "standards" rather than "rules," resulting in a regulatory approach that favors so-called "soft" law models over ones based on "hard" law imposed through a command-and-control system.[115] The main reason behind such an approach is that the practice of law is extremely dynamic and unpredictable, with lawyers often confronting complex and novel situations on a regular basis. As a result, it is difficult to predict, let alone regulate with particularity, every interaction and decision lawyers must make.[116] Given the desire to provide lawyers with a degree of leeway and creativity in the practice of their craft, the preferred approach to the legal profession's regulation is one in which the rules provide general guidance, such as requiring competent representation and prohibiting unreasonable fees[117] (although some specific rules, mostly having to do with conflicts of interest, also apply[118]). However, the so-called rules that govern the legal profession are better characterized as standards, as they largely provide general guidance for ethical conduct as opposed to specific prohibitions designed to direct conduct in every conceivable situation.[119]

For these reasons, the oversight regime that guides attorney conduct exhibits some of the key features of New Governance Theory.

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[114] *See, e.g.*, Judy Perry Martinez & Geoffrey Thomas Burkhart, *Report on the Future of Legal Services in the United States: 12 Recommendations for Improving the Delivery of Legal Services to the American Public*, 86 BAR EXAMINER 17, 17–19 (2019) (describing extensive solicitation of community input as part of the work of the ABA Committee on the Future of Legal Services).

[115] For a discussion of soft law and New Governance Theory, see generally David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination,* 11 Eur. L.J. 343 (2005).

[116] *See* MODEL RULES OF PRO. CONDUCT r. 5.1 Preamble & Scope, ¶¶ 15–16 (AM. BAR ASS'N 2020).

[117] *Id.* at R. 1.5(a) (prohibiting unreasonable fees); *id.* at r. 1.8(a) (outlining procedures necessary to engage in a business transaction with a client).

[118] *Id.* at r. 1.8(a).

[119] Michele M. DeStefano, *Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go*, 23 GEO. J. LEGAL ETHICS 1119, 1195 (2010) (explaining that "despite their increased specificity" the rules that govern the legal profession are still "standards as opposed to hard and fast rules").

As the following discussion shows, the rules that govern civil litigation also exhibit some of these same features.

2. New Governance and the Rules of Civil Litigation

The rules governing civil practice in the federal trial courts emerge from a process that incorporates key features of New Governance. Under Article III of the Constitution, Congress holds the ultimate responsibility for establishing lower courts as it may "from time to time, ordain and establish" those courts.[120] In turn, Congress, through the Rules Enabling Act,[121] has delegated the responsibility of amending the rules governing civil matters to the judiciary.[122] Pursuant to that authority, there exists a Standing Committee of the Judicial Conference of the United States, known as the Committee on Rules of Practice and Procedure.[123] That second committee reviews and develops formal recommendations for changes to the rules that may emerge from any of the five advisory committees organized within it.[124] The Standing Committee then offers suggestions for proposed rule changes to the Judicial Conference of the United States.[125] The memberships of the Standing Committee and those advisory committees include

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[120] U.S. CONST., art. 3, § 1 (placing judicial power in the Supreme Court and such inferior courts as Congress may create); *id.* at art. I, § 8 (Congress's power to create inferior courts); *see also* Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285, 1288–90 (1994) (describing Congress's authority to make rules for the courts and the fact that it has delegated much of that authority to the courts themselves); Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 737–38 (1995) (describing rulemaking authority).

[121] 28 U.S.C. §§ 2071–77.

[122] § 2073(b).

[123] *See id.* ("The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence"). For a description of this committee, including its basis in law, membership, and its historical origins, see Blasie, *supra* note 80, at 596–98.

[124] *See* § 2073(b) ("Such standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice.").

[125] For a description of the standing committees, see Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH. L. REV. 323, 328–31 (1991).

stakeholders from across the legal profession.[126] A federal judge serves as chair of each committee, and each committee generally has a reporter, typically a member of the legal academy, who is responsible for coordinating the committee's work.[127]

The Judicial Conference meets twice per year and issues a Report of the Proceedings that describes any recommendations that arise from those meetings.[128] A proposed rule may emerge from an advisory or standing committee, which is then subject to public comment.[129] Recommendations revised in light of public commentary are sent to the general Standing Committee,[130] which takes up any proposals. If the committee considers any recommendations appropriate for adoption, it will forward them to the Judicial Conference.[131] If this body approves the recommended changes, it will pass them along to the Supreme Court of the United States.[132] If the Supreme Court approves the recommended changes, it transmits those changes to Congress, at which point Congress retains a statutory time period in which it can enact legislation to reject, modify, or defer the amendment.[133] Congress can also take no action and acquiesce in the proposed change, in which case it holds the force of law without congressional action.[134]

At the federal courts of appeals, the chief judge of each circuit convenes a council consisting of an equal number of circuit and district judges to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit."[135] Below that, at the district court level, "boards of judges" typically propose local court rules for their respective districts after a period for public

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[126] These stakeholders include federal judges, practicing lawyers, law professors, state chief justices, and representatives of the U.S. Department of Justice. *Id.* at 329.

[127] *See id.*

[128] *See About the Judicial Conference*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference [https://perma.cc/P43M-XD8A] (last visited Sept. 21, 2024).

[129] *See* Baker, *supra* note 125, at 329–31.

[130] *Id.* at 329.

[131] *Id.* at 330–31.

[132] *Id.* at 331.

[133] *Id.*

[134] *Id.*

[135] 28 U.S.C. § 332(d)(1).

comment.[136] Once those comments are received, the proposed amendments are passed to the circuit court for approval.[137]

The process by which the rules of civil litigation are amended exhibits shades of New Governance approaches, particularly since this process typically includes a range of stakeholders. However, there is still self-certification[138] as well as efforts designed to encourage private engagement to resolve disputes short of invoking a district court's intervention.[139] As the following discussion shows, the development of court system rules and standing orders of individual judges for GenAI use in civil litigation exhibit many similar New Governance features.

C. A Typology of the Rules Addressing the Use of GenAI in Litigation

Apart from the *ex post* sanctions orders issued in the cases described above,[140] a relatively small but growing group of court systems and individual judges have promulgated orders that address litigant use of GenAI in court pleadings and other filings.[141] Unlike their backward-looking corollaries of sanctions orders, these standing orders set forth a range of different *ex ante* directives. Their contents range from modest warnings about the potential risk that using such

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[136] As an example of how this process works, in the Northern District of New York, proposed rules—whether directly submitted via public comments or derived from public comments—must be approved by both a board of district judges and a board of circuit judges. *See* Press Release, U.S. Dist. Ct., N. Dist. of N.Y., Amendments to the NDNY Local Rules, https://www.nynd.uscourts.gov/content/amendments-ndny-local-rules [https://perma.cc/V26D-BA3P] (click link titled "Amendments of NDNY Local Rules effective January 1 2023.pdf") (last visited Sept. 21, 2024).

[137] *See* Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533, 545 (2002) ("The Judicial Conference supported the 1985 revisions of Federal Rule of Civil Procedure 83 and Federal Rule of Criminal Procedure 57, which mandated that districts prescribe local rules after providing notice, and an opportunity for comment, to the public and that standing orders which individual judges issue not contravene the Federal Rules of Civil or Criminal Procedure or local rules.").

[138] *See* FED. R. CIV. P. 11(b) (requiring self-certification of merits of claims and factual assertions).

[139] *See* FED. R. CIV. P. 37(d)(1)(B) (requiring that litigants certify they have attempted to resolve a dispute before bringing it to court).

[140] *See supra* Part II.D.

[141] *See infra* Part III.C.1–7.

tools poses to outright prohibitions on their use in court filings. The analysis included in this Section provides an overview of individual standing orders and court rules generated by judges and court systems, such as individual district courts. The focus is exclusively on federal courts and does not explore the possibility that individual judges or even entire state court systems have developed rules regarding the use of GenAI in litigation. Instead, this Article's focus is on the promulgation of rules relating to this technology in the federal judicial system alone, specifically in civil litigation.

Through outlining a general typology of these rules and standing orders, what first stands out is that, at present, the overwhelming majority of judges in the federal system have issued no such orders and are operating under no special rule regarding GenAI. It is possible that, at some point, the Federal Rules Committee will promulgate a rule of general applicability and incorporate it into the Federal Rules of Civil Procedure. However, that has not yet happened.

This overview shows that these interventions can be classified based on the nature of the prohibitions or guidance they might offer. It also demonstrates that these interventions exhibit features of New Governance models. Moreover, this analysis can help inform efforts to take a holistic approach in the promulgation of such rules with more general applicability, including at the level of the Federal Rules, but also in individual court systems. At the same time, this typology shows that courts and even individual judges are experimenting with different approaches to discourage the improper use of GenAI (as well as some prohibiting it altogether) to prevent the sorts of harms described above.

With these thoughts in mind, the following sets forth a typology of the different elements of the standing orders and court rules that judges have issued as they relate to the use of GenAI in court filings. This typology shows that judicial responses range from mere warnings and disclosures to outright prohibitions. In addition, some of the approaches more commonly taken by judges and courts exhibit New Governance-style characteristics. The remainder of this Part explores the different types of orders and places them along a continuum from least intrusive to most prohibitive. This Section also describes one U.S. Circuit Court of Appeals's efforts to amend its appellate practice rules in light of new technologies, the stiff resistance it encountered from

the practice bar, and its ultimate retreat from the proposed amendment.[142] After laying out this typology of judicial interventions, this Section reveals how they exhibit many of the features common in New Governance models.

1. Simple Warnings and Reminders

The first type of order in this typology includes those in which courts have tried to create a modest amount of "friction" or "meaningful inefficiency" to ensure litigants think twice before filing pleadings that might include fictitious authorities produced by GenAI.[143] In the Southern District of New York, Federal District Judge Arun Subramanian's standing order simply warns litigants of the dangers of using GenAI to prepare their filings.[144] Judge Iain Johnston goes a bit further, however, as his order explains that some court "standing orders—which are unfortunately necessary—are often terse reminders that *all filers* need to follow statutes, the Federal Rules of Civil Procedure, and the Local Rules for the U.S. District Court for the Northern District of Illinois."[145] With this idea in mind, his order provides:

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[142] *See infra* Part III.C.7.

[143] On the concept of meaningful inefficiency, see ERIC GORDON & GABRIEL MUGAR, MEANINGFUL INEFFICIENCIES: CIVIC DESIGN IN AN AGE OF DIGITAL EXPEDIENCY 7–8 (2020); *see also* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 19 (1985) (defining transaction costs as "the economic equivalent of friction").

[144] Individual Practices in Civil Cases at 7 (S.D.N.Y. July 29, 2023) (Judge Subramanian), https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AS%20Subramanian%20Civil%20Individual%20Practices.pdf [https://perma.cc/7JZY-MMZY].

[145] Artificial Intelligence (AI) (N.D. Ill.) (Judge Johnston), https://www.ilnd.uscourts.gov/judge-info.aspx?Bt1LmR2QgBbCj2VD6w9tXA== [https://perma.cc/KS7S-AZTK] (click link titled "Artificial Intelligence (AI)") (last visited Oct. 12, 2024). The order also refers to the following article on the topic: Maura R. Grossman, Paul W. Grimm & Daniel G. Brown, *Is Disclosure and Certification of the Use of Generative AI Really Necessary?*, 107 JUDICATURE 68 (2023), https://judicature.duke.edu/wp-content/uploads/2023/10/AIOrders_Vol107No2.pdf [https://perma.cc/C55C-S5BK]. Judge Rita F. Lin has issued a similar order, making clear that the use of GenAI is "not prohibited," but that counsel must "personally confirm for themselves the accuracy of any research conducted by these means, and counsel alone bears ethical responsibility for all statements made in filings." Standing Order for Civil Cases Before Judge Rita F. Lin at 6 (N.D. Cal. May 17, 2024) (Judge

> Anyone—counsel and unrepresented parties alike—using [artificial intelligence ("AI")] in connection with the filing of a pleading, motion, or paper in this Court or the serving/delivering of a request, response, or objection to discovery must comply with Rule 11(b) and Rule 26(g) of the Federal Rules of Civil Procedure, and any other relevant rule, including any applicable ethical rule.[146]

In October 2023, the Eastern District of Texas amended its local rules regarding the use of artificial intelligence by both *pro se* litigants and attorneys. The district court cautions lawyers who rely on GenAI tools that such "technologies may produce factually or legally inaccurate content and should never replace the lawyer's most important asset—the exercise of independent legal judgment."[147] Accordingly, it reminds lawyers that if they should "choose[ ] to employ technology in representing a client, [they] continue[ ] to be bound by the requirements of Federal Rule of Civil Procedure 11, [local rules], and all other applicable standards of practice."[148] The district court also requires lawyers to "review and verify any computer-generated content to ensure that it complies with all such standards."[149] The district court imposes similar requirements on *pro se* litigants, seemingly incorporating the same standard to unrepresented litigants that it applies to attorneys.[150]

Finally, in this category of orders reminding litigants of their obligations under existing rules and their application to the use of GenAI, the rule issued by Magistrate Judge Jeffrey Cole of the Northern District of Illinois should be included. His order provides:

> Any party using AI in the preparation of materials submitted to the court must disclose in the filing that an AI tool was used to conduct legal research and/or was used in any way in the preparation of the submitted document. Parties should not assume that mere reliance on an AI tool will be presumed

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Lin), https://www.cand.uscourts.gov/wp-content/uploads/2023/03/2024-05-17-Civil-Standing-Order.pdf [https://perma.cc/8BBC-6WHW].

146 Artificial Intelligence (AI), *supra* note 145.

147 General Order 23-11, General Order Amending Local Rules at 4 (E.D. Tex. Oct. 30, 2023), https://txed.uscourts.gov/sites/default/files/goFiles/GO%2023-11%20Amending%20Local%20Rules%20Effective%20December%201%2C%2023.pdf [https://perma.cc/M7HZ-NLVC].

148 *Id.* at 2

149 *Id.*

150 *Id.*

> to constitute reasonable inquiry. The Federal Rules of Civil Procedure, including Rule 11, will apply.[151]

2. Disclosure with Certification of Accuracy

Some judges and courts have gone further. Beyond requiring that litigants disclose their use of GenAI in the preparation of filings, several judges have also required that litigants confirm the accuracy of such filings.[152] An example of a more detailed order of this nature is the one issued by Judge Araceli Martínez-Olguín, which provides:

> Use of ChatGPT or other such tools is not prohibited, but counsel must at all times personally confirm for themselves the accuracy of any content generated by these tools. At all times, counsel—and specifically designated lead trial counsel—bears responsibility for any submission made by the party that the attorney represents. Any submission containing AI-generated content must include a certification that lead trial counsel has personally verified the content's accuracy. Failure to include this certification or comply with this verification requirement will be grounds for sanctions. Counsel is responsible for maintaining records of all prompts or inquiries

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[151] The Use of "Artificial Intelligence" in the Preparation of Documents Filed Before this Court (N.D. Ill.) (Magistrate Judge Cole), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Cole/Artificial%20Intelligence%20standing%20order.pdf [https://perma.cc/4JDR-F993] (last visited, July 27, 2024). The order goes on to reiterate the point regarding the application of Rule 11 to any filing by providing that "a certification on a filing will be deemed as a representation by the filer that they have read and analyzed all cited authorities to ensure that such authorities actually exist and that counsel actually have assessed and considered the cited case or other authority offered in support or in contravention of the particular proposition." *Id.*

[152] Standing Order Re: Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson (E.D. Pa. June 6, 2023) (Judge Baylson), https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf [https://perma.cc/2NUA-XB3R]; Standing Order for Civil Cases Assigned to Judge Stanley Blumenfeld, Jr. at 6 (C.D. Cal. Mar. 1, 2024) (Judge Blumenfeld), https://www.cacd.uscourts.gov/sites/default/files/documents/SB/AD/1.%20Civil%20Standing%20Order%20%283.1.24%29%20[Final].pdf [https://perma.cc/SUD8-3APN]; Judge's Procedures for Honorable Rosella A. Oliver Magistrate Judge (C.D. Cal.) (Magistrate Judge Oliver), https://www.cacd.uscourts.gov/honorable-rozella-oliver (last visited Oct. 12, 2024) [https://perma.cc/Q64G-6NT]. Before passing away in May of 2024, Judge Gene Pratter of the Eastern District of Pennsylvania had issued a similar order. Judge Gene E.K. Pratter's General Pretrial and Trial Procedures at 9 (E.D. Pa. Oct. 2023) (Judge Pratter), https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/prapol2.pdf [https://perma.cc/2UV4-5CA6].

> submitted to any [genAI] tools in the event those records become relevant at any point.[153]

Along similar lines, Judge Stephen Vaden of the U.S. Court of International Trade offers a more robust disclosure requirement, providing that litigants must not only disclose GenAI use in filings but also confirm that no confidential client information was shared with the GenAI service the litigant used.[154]

3. Disclosure of the Nature of GenAI Use and Certification of Source Legitimacy

The next type of order also includes disclosures around GenAI use but goes farther than the first two categories listed above. Orders in this group require all litigants to first certify whether they used GenAI in the preparation of legal filings. If they did use such technologies, they must also certify that they checked authorities for accuracy from reliable sources. An example of this type of order is the one issued by Judge Brantley Starr of the Northern District of Texas, which provides:

> All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT or Harvey.AI) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being.[155]

Judge Starr's order also provides explanatory language regarding the purpose behind the order. The order notes that GenAI "platforms are incredibly powerful and have many uses in the law. . . . But legal briefing is not one of them. Here's why."[156] The platforms "are prone to hallucinations and bias."[157] With respect to hallucinations, Judge Starr notes that GenAI platforms "make stuff up—even quotes and

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[153] Standing Order for Civil Cases Before District Judge Araceli Martínez-Olguín at 5 (N.D. Cal. Nov. 22, 2023) (Judge Martínez-Olguín), https://www.cand.uscourts.gov/wp-content/uploads/2023/03/AMO-Civil-Standing-Order-11.22.2023-FINAL.pdf [https://perma.cc/B5BB-NLNE].

[154] Order on Artificial Intelligence (Ct. Int'l Trade June 8, 2023) (Judge Vaden), https://www.cit.uscourts.gov/sites/cit/files/Order%20on%20Artificial%20Intelligence.pdf [https://perma.cc/8WVK-4CD5].

[155] Mandatory Certification Regarding Generative Artificial Intelligence (N.D. Tex.) (Judge Starr), https://www.txnd.uscourts.gov/judge/judge-brantley-starr [https://perma.cc/V79T-U33K] (last visited July 30, 2024).

[156] *Id.*

[157] *Id.*

citations."[158] Concerning reliability and bias, "[w]hile attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath."[159] For these reasons, "these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth)."[160] For Judge Starr, these platforms are "[u]nbound by any sense of duty, honor, or justice," and "act according to computer code rather than conviction, based on programming rather than principle."[161]

Judge Starr's order offers the following remedy for those who may contest its conclusions: "Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why."[162] Finally, the order notes that the court

> will strike any filing from a party who fails to file a certificate on the docket attesting that they have read the Court's judge-specific requirements and understand that they will be held responsible under Rule 11 for the contents of any filing that they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing.[163]

4. Litigants Must Make Specific Disclosures and Certifications of Use of GenAI

The next type of order in this typology is represented by those issued by Judge Evelyn Padin of the District Court of New Jersey and Magistrate Judge Gabriel Fuentes of the Northern District of Illinois. Judge Padin's order provides:

> The use of any [GenAI] (e.g., OpenAI's ChatGPT or Google's Bard) for any court filings requires a mandatory disclosure/certification that: (1) identifies the [GenAI] program; (2) identifies the portion of the filing

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158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.* A similar order, including the explanatory language quoted above, has been issued by Judge Matthew J. Kacsmaryk of the Northern District of Texas. Mandatory Certification Regarding Generative Artificial Intelligence (N.D. Tex.) (Judge Kacsmaryk), https://www.txnd.uscourts.gov/judge/judge-matthew-kacsmaryk [https://perma.cc/NX2G-FLK3] (last visited Sept. 21, 2024).

> drafted by [GenAI]; and (3) certifies that the [GenAI] work product was diligently reviewed by a human being for accuracy and applicability.[164]

Similarly, Judge Fuentes's order offers guidance to and imposes the following obligations on litigants appearing before him:

> Any party using any [GenAI] tool to conduct legal research or to draft documents for filing with the Court must disclose in the filing that AI was used, with the disclosure including the specific AI tool and the manner in which it was used . . . . Parties should not assume that mere reliance on an AI tool will be presumed to constitute reasonable inquiry, because, to quote a phrase, "I'm sorry, Dave, I'm afraid I can't do that . . . . This mission is too important for me to allow you to jeopardize it."[165]

Judge Fuentes goes on to include in his order that "[o]ne way to jeopardize the mission of federal courts is to use an AI tool to generate legal research that includes 'bogus judicial decisions' cited for substantive propositions of law."[166]

In addition, Judge Fuentes's order provides:

> Just as the Court did before the advent of AI as a tool for legal research and drafting, the Court will continue to presume that the Rule 11 certification is a representation by filers, as living, breathing, thinking human beings, that they themselves have read and analyzed all cited authorities to ensure that such authorities actually exist and that the filings comply with Rule 11(b)(2).[167]

5. Disclosure of Use, Identification of Program Used, Certification of Authorities Checked for Accuracy, and Note that Lawyer Will Be Held Responsible for Filings

Several judges have followed the approach of United States District Judge Leslie E. Kobayashi of the District of Hawaii, whose standing order provides that litigants who use GenAI in preparing filings "must disclose in the document that AI was used and the

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[164] Judge Evelyn Padin's General Pretrial and Trial Procedures at 2 (D.N.J. Nov. 13, 2023) (Judge Padin), https://www.njd.uscourts.gov/sites/njd/files/EPProcedures.pdf [https://perma.cc/5W2L-LT4R].

[165] Standing Order for Civil Cases Before Magistrate Judge Fuentes at 2 (N.D. Ill. May 31, 2023) (Magistrate Judge Fuentes), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20rev%27d%205-31-23%20(002).pdf [https://perma.cc/BC2Y-GRTK] (quoting 2001: A SPACE ODYSSEY (Metro-Goldwyn-Mayer 1968)) (second ellipses in original).

[166] *Id.* at 2 (citation omitted).

[167] *Id.*

specific AI tool that was used."[168] In addition, they "must further certify in the document that the person has checked the accuracy of any portion of the document drafted by [genAI], including all citations and legal authority."[169] Judge Scott L. Palk of the Western District of Oklahoma and Magistrate Judge Jason A. Robertson of the Eastern District of that same state have issued orders practically identical to that of Judge Kobayashi.[170]

6. Prohibitions

While all of the orders listed above stop short of prohibiting lawyers and *pro se* litigants from using GenAI in research and preparation of court filings, at least some orders have gone so far as to do just that, and even more. Judge Michael J. Newman of the District Court for the Southern District of Ohio not only prohibits the use of GenAI tools in the production of court filings, but also imposes an affirmative duty on litigants to disclose when it appears to them that others have done so.[171] The federal court for the Eastern District of Missouri has issued an order banning *pro se* litigants from using GenAI in the preparation of any court filings as follows:

> No portion of any pleading, written motion, or other paper may be drafted by any form of generative artificial intelligence. By presenting to the Court (whether by signing, filing, submitting, or later advocating) a pleading,

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[168] Disclosure and Certification Requirements, Generative Artificial Intelligence at 1 (D. Haw.) (Judge Kobayashi), https://www.hid.uscourts.gov/cms/assets/95f11dcf-7411-42d2-9ac2-92b2424519f6/AI%20Guidelines%20LEK.pdf [https://perma.cc/4T2Z-8KVF] (last visited Oct. 12, 2024).

[169] *Id.*

[170] *See* Disclosure and Certification Requirements, Generative Artificial Intelligence at 1 (W.D. Okla.) (Judge Palk), https://www.okwd.uscourts.gov/wp-content/uploads/AI_Guidelines_JudgePalk.pdf [https://perma.cc/8N37-23D6] (last visited Oct. 12, 2024); Disclosure and Certification Requirements, Generative Artificial Intelligence at 1 (E.D. Okla.) (Magistrate Judge Robertson), https://www.oked.uscourts.gov/sites/oked/files/AI%20Guidelines%20JAR%209.27.23.pdf [https://perma.cc/RG8U-FZ8V] (last visited Oct. 12, 2024).

[171] Standing Order Governing Civil Cases at 11 (S.D. Ohio Dec. 18, 2023) (Judge Newman), https://www.ohsd.uscourts.gov/sites/ohsd/files//MJN%20Standing%20Civil%20Order%20eff.%2012.18.23.pdf [https://perma.cc/6UXY-SA9Y].

> written motion, or other paper, self-represented parties and attorneys acknowledge they will be held responsible for its contents.[172]

This overview of a range of federal court orders on the use of GenAI in litigation shows that courts have deployed a multitude of tactics for dealing with one main risk: that GenAI will be abused in ways that impact the integrity of the litigation process. This array of responses strongly aligns with New Governance approaches to regulatory oversight generally. In examining one court system's decision to reject the issuance of a rule regarding GenAI, another aspect of the adoption of these rules invokes New Governance models: stakeholder engagement.

7. The Fifth Circuit's Effort to Issue a Rule Regarding GenAI

This Section describes the Fifth Circuit's efforts to amend its appellate practice rules in light of new technologies, the stiff resistance the Circuit encountered from the practice bar, and its ultimate retreat from the amended rule. In November 2023, the Fifth Circuit requested comments on proposed changes to a court rule as well as a form used by litigants before that court.[173] As part of the certification with respect to matters like word limits and other formal rules for appellate filings,[174] the Fifth Circuit proposed adding that both "counsel and unrepresented filers" would have to "further certify that no [GenAI] program was used in drafting the document presented for filing." Additionally, if such a program was used, further certification should show that "all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human."[175] The Fifth Circuit solicited comments on the proposed rule change.[176]

One commentator argued that the rule change was unnecessary:

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[172] *Self-Represented Litigants*, U.S. DIST. CT.: E. DIST. OF MO., https://www.moed.uscourts.gov/self-represented-litigants-srl [https://perma.cc/6JPP-KVSQ] (last visited Jan. 22, 2024). The court also references Rule 11 of the Federal Rules of Civil Procedure at the end of its directive. *Id.*

[173] *See* Notice of Proposed Amendment to Fifth Cir. R. 32.3 at 1–2 (5th Cir. 2023), https://www.ca5.uscourts.gov/docs/default-source/default-document-library/public-comment-local-rule-32-3-and-form-6 [https://perma.cc/8UPY-ZKYD] (last visited Oct. 12, 2024).

[174] Form 6, Appendix of Forms to the Fed. R. App. P.

[175] Notice of Proposed Amendment to Fifth Cir. R. 32.3, *supra* note 173, at 1.

[176] *Id.* (demonstrating notice was issued November 27, 2023, and comments were sought by January 4, 2024).

> Court rules singling out the supposed unique dangers of "AI", are not necessary and bound to become relics. If everything of [sic] similar level of intrinsic, unique importance (i.e., low) had to be included in a certificate to a brief, the certificates would soon be longer than the briefs themselves. "AI-focused court rules", like Cabbage Patch Kids, pet rocks, and fidget spinners, are a passing fad that may bring us some amusement but add nothing to substance.[177]

Another commentator was not opposed to the rule change, but felt the language reviewed "by a human" was not "strict enough," arguing further that

> the minimum standard of care for a competent, reasonably prudent lawyer would allow any "human" to confirm his or her cites and the propositions espoused in a brief that is utilizes [sic]. Even setting aside lazy, hallucinating AI citations, this is an inappropriate standard for review of any cites. It would be problematic if such a rule became the "standard of care."[178]

Another commentator pointed out the problem of inappropriate citations was not limited to those litigants who mistakenly might rely on the information produced by GenAI:

> The advent of [GenAI] exposed, but did not cause the problem of inaccurate citations in court filings long known to experienced practitioners. To the extent that pervasive miscitation remains a concern, the proposed rule should require lawyers to certify that a human verified the accuracy of all research and arguments contained in filings, and not just those generated by AI.[179]

Based on the responses received by various stakeholders, the Fifth Circuit ultimately decided against adopting the special rule for the use of GenAI in litigation.[180] Instead, the circuit court issued a different order, concluding that "having considered the proposed rule, the accompanying comments, and the use of artificial intelligence in the legal practice, [the court] has decided not to adopt a special rule

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[177] Email from Brian King to Margaret Dufour (Nov. 29, 2023, 9:21 AM) (emphasis omitted), *reprinted in Comments on Proposed Rule Change to Fifth Circuit Rule 32.3 and Form 6*, https://www.reuters.com/legal/transactional/lawyers-voice-opposition-5th-circuits-proposed-ai-rule-2024-01-29/ [https://perma.cc/XND9-94FZ] (follow "letters made public" hyperlink).

[178] Letter from Lance L. Stevens, Stevens Law Group, to Lyle W. Cayee, Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Dec. 5, 2023), *reprinted in Comments*, *supra* note 177.

[179] *Id.* at 2.

[180] Court Decision on Proposed Rule, at 1 (5th Cir. 2024), https://www.ca5.uscourts.gov/docs/default-source/default-document-library/court-decision-on-proposed-rule.pdf?sfvrsn=5967c92d_2 [https://perma.cc/9TZM-A7CR].

regarding the use of artificial intelligence in drafting briefs at this time."[181] That order also provided that "[p]arties and counsel are reminded of their duties regarding their filings before the court under Federal Rule of Appellate Procedure 6(b)(1)(B)," and "are responsible for ensuring that their filings with the court, including briefs, shall be carefully checked for truthfulness and accuracy as the rules already require."[182] The order closed with the following admonition: " 'I used AI' will not be an excuse for an otherwise sanctionable offense."[183] The Fifth Circuit's process and ultimate decision regarding the use of GenAI shows that, through stakeholder engagement, regulators (that is, the court here) considered but then rejected the adoption of a rule regarding the use of such technology. This reveals the reliance of the court on an approach common in, and preferred by, New Governance models.

D. New Governance Features of Ex Ante *Rules Regarding GenAI*

The previous Section shows that the efforts by judges and court systems to rein in improper GenAI use in the context of federal civil litigation have exhibited several of the key features of New Governance models. There has been at least some stakeholder engagement in the development (or rejection) of rules regarding GenAI use. The Fifth Circuit's effort to develop a rule to cover the improper use of GenAI was met with stiff opposition. Considering that resistance, the court chose not to implement any rule. But in court systems that do implement rules moving forward, those rules are likely to result from the work of committees consisting of practitioners and academics—or simply from courts fielding feedback from practitioners, as the Fifth Circuit did when it proposed, and ultimately rejected, a circuit-wide rule on GenAI.[184] In addition, at least one judge has invited litigants to offer any evidence they might have that suggests his approach to regulating GenAI is off the mark.[185] It would come as no surprise to learn that other court systems are currently considering

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[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] Mandatory Certification Regarding Generative Artificial Intelligence, *supra* note 155.

amendments to their local rules, and such debates are happening in settings where various stakeholders can provide input to the courts.

The mere fact that different court systems and judges have begun to experiment—by promulgating the rules and standing orders described in the previous Part—reveals other aspects of this process reflecting elements of New Governance approaches. These phenomena suggest that the development of these local rules and standards related to GenAI are both experimental and decentralized, with some courts and even individual judges issuing their own rules of practice by litigants before them.

On one level, this may create a patchwork quilt of rules that vary from judge to judge. But it also means that this array of rules can generate feedback in real-time from the practices of litigants. Courts can learn whether some approaches—softer, disclosure-based rules, as opposed to prohibitions, for example—might work better than others. This combination of experimentation, differentiation, and decentralization can create feedback loops, leading to a myriad of regional regulations. But this could also lead to well-informed, higher-level regulation, like the adoption of new rules that govern all federal courts. Additionally, these feedback loops may generate interest in and information for state court systems seeking to experiment with similar rules that might serve them well.

Another critical feature of the current array of rules and standing orders is that they are largely based on soft-law models. They rely on things like warnings about the risks of the use of GenAI in the preparation of legal filings, disclosures about the use of these new technologies—which likely leads litigants to "think twice" before using them without care—and self-certifications of compliance (meaning there is a degree of self-regulation in these models). At least one standing order that prohibits the use of these new tools in the preparation of legal files also imposes an affirmative duty on litigants to report when it appears that other litigants have violated that prohibition.[186] This draws elements from New Governance approaches that encourage the incorporation of whistleblower

[186] Standing Order, *supra* note 165.

protections into regulatory systems.[187] Admittedly, this is more of a whistleblower mandate. It remains to be seen whether Judge Newman will punish a lawyer for failing to comply with such a reporting mandate.

Finally, the array of rules and standing orders rely mostly on soft-law approaches, like warnings and self-certification (which is a form of self-regulation). At the same time, it is important to note that these so-called soft-law protections are always backstopped by robust punishments—after the fact—for lawyers and *pro se* litigants who fail to comply with the terms of these *ex ante* rules.

Given the ongoing development and proliferation of individual rules, it is still too early to determine whether the current regulatory regime for overseeing the use of GenAI in civil litigation is achieving its intended effects. After several high-profile instances where the technology appears to have been used with significant adverse consequences, there have been few similar cases since. It does appear that those jurisdictions and courtrooms operating under the orders described here have not had litigants present filings tainted by GenAI hallucinations.

Whether judicial interest in these issues and the actions of the judges and court systems described above have chilled such improper conduct is difficult to determine. Given that the percentage of cases covered by these sorts of rules when compared to the entirety of the federal court system's caseload is relatively small, it is impossible to determine whether that is a mere coincidence or a causative effect. Nevertheless, the attention of these judges and court systems to these matters has quite possibly led at least some litigants to think twice before utilizing GenAI without care. Still, the fact that some attention to these matters, and the high-profile examples of lawyers who have improperly used the technology and faced sanctions for such use, has likely led many practitioners to take some care before they use GenAI tools and rely on the work product they generate. Additional data from these courts, and the courts where no new rules apply, could lead more court systems and judges to institute similar orders. More importantly,

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[187] For a discussion of the value of whistleblowers in the context of New Governance regulatory approaches, see Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1249–67 (2009).

it could also help inform efforts to determine whether to change the Federal Rules of Civil Procedure as a whole to incorporate some cautions, or even prohibitions, on GenAI.

IV. HOW THE EXPERIENCE OF REGULATING GENAI IN THE COURTS CAN INFORM EFFORTS TO REGULATE NEW TECHNOLOGIES

Out of necessity, judges have found themselves having to grapple with issues of "regulating" the use of GenAI. While existing tools enable courts to punish those who misuse this technology after the fact, some courts and judges have attempted to impose *ex ante* rules designed to prevent such misuse before it even occurs. In so doing, the range of interventions they have implemented bears the hallmarks of New Governance regulatory approaches. As lawmakers, regulators, industry, and consumers explore ways to ensure GenAI is used safely, effectively, and securely, can GenAI regulation in general be informed by these judges' New Governance efforts?[188] This Part briefly explores how jurists' approaches to regulating GenAI might translate into broader interventions addressing two other major threats posed by this technology: consumer privacy and use of intellectual property by LLMs. This Part is, of course, tentative, exploratory, and speculative. It is also highly procedural: It intentionally discusses largely process-oriented efforts as opposed to substantive prohibitions. This is because efforts to regulate artificial intelligence will necessarily face a highly dynamic field where technological developments can quickly overcome efforts to regulate them.[189] For those reasons, structural, adaptable, and procedural measures are much more useful at this stage in the evolution of artificial intelligence.

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[188] Some of the threats posed by unchecked artificial intelligence are spelled out in the Biden Administration's Executive Order on artificial intelligence include violations of consumer privacy, national security risks, and algorithmic discrimination, and trustworthiness. *See generally* Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Nov. 1, 2023).

[189] Jonas J. Monast, *Emerging Technology Governance in the Shadow of the Major Questions Doctrine*, 24 N.C. J.L. & TECH. 1, 4 (2023) (noting that a "common challenge[] with emerging technology governance" is designing a regulatory system "flexible enough to keep pace with changing technologies").

A. Stakeholder Engagement

First and foremost, any effort to regulate GenAI should start with broad stakeholder engagement. Such engagement should include regulators and lawmakers; the entities creating these applications; content creators like media outlets, artists, and writers whose content is being used to train the artificial intelligence; non-profit organizations engaged in consumer protection efforts; and consumers who are likely to use these services—and whose private information might be used to train LLMs. This kind of stakeholder engagement must go beyond the occasional congressional hearing where a few leaders of technology companies come before lawmakers and express their willingness to work toward safety and security, which brings no progress on any meaningful legal or regulatory interventions.

B. Diffused and Decentralized Regulators

It is clear that there is no overarching rule related to the use of GenAI in the federal court system. All of the efforts described here are the product of diffused and decentralized decision-making, a hallmark of New Governance approaches. While the experimentation occurring at the local level might one day catalyze change with the Federal Rules of Civil Procedure, individual judges and select court systems have chosen to issue an array of different standing orders and rules that address the use of GenAI in the courts. The overwhelming majority of judges who make up the federal judiciary have not issued standing orders related to GenAI. By extension, the overwhelming majority of litigants with matters before the federal judiciary are doing so without any special guidance regarding the use of GenAI in their court filings.

Whether litigant behavior will change in light of the existence of these orders remains to be seen. For the time being, it appears that many litigants have taken the experience of the lawyers in *Mata v. Avianca* to heart since only a few courts appear to have faced instances where litigants clearly used GenAI. It remains to be seen whether that will continue to be the case and whether jurists with explicit orders regarding GenAI end up with fewer problematic filings than those jurists with no such orders. If that is the case, it will lend credence to the argument that these orders help reduce such filings; if not, this will be evidence that no orders are necessary in light of existing tools. The outcomes that emerge from this decentralized experimentation will

inform reformation efforts at the national level—or suggest that no such reform is necessary.

C. Soft-Law: Self-Regulation, Rules over Standards, and Self-Certification

There is a clear need to regulate the activities of technology companies developing the GenAI models described in this Article. Yet, GenAI models are being developed so rapidly that the promulgation of meaningful and detailed legislation and regulations might be difficult. Any laws put forth the risk of stifling innovation or, as is more likely, getting outpaced by it. A standards-based approach, as opposed to hard-and-fast top-down rules, seems to be an appropriate approach in this space, and such standards would cover things like consumer privacy and the protection of content creators' intellectual property.[190] Moreover, the first step of such protections could be self-certification, or certification by an independent and private entity, where the application developers adhere to a range of critical standards in the creation of GenAI-based products.[191]

D. Disclosure Backed by Liability Rules

Another element of New Governance approaches is that they tend to favor disclosure-based regimes in contrast to more heavy-handed regulation.[192] Should such an approach apply to this context, it should not be a weak form of disclosure, such as one that a company buries in a lengthy terms of service agreement. Rather, the disclosure should be understandable, including clear explanations of the entity's practices with respect to critical elements of the overall system for regulating

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[190] Nicol Turner Lee et al., *Around the Halls: What Should the Regulation of Generative AI Look Like?* BROOKINGS INST. (June 2, 2023) (describing the range of topics regulation of generative AI should cover, including privacy and intellectual property), https://www.brookings.edu/articles/around-the-halls-what-should-the-regulation-of-generative-ai-look-like/ [https://perma.cc/329D-5MGH].

[191] New Governance literature does not support purely private certification serves as an effective regulatory tool. *See* Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498, 508 (2004).

[192] *See* Jebe, *supra* note 94, at 247–64 (describing disclosure-based regimes in New Governance Theory).

GenAI applications.[193] It should also include liability for failure to abide by the disclosure regime.

E. Robust Whistleblower Protections

Companies developing GenAI applications will claim that their algorithms and other tools used in product development are trade secrets that need not be revealed to regulators, consumers, or competitors. One of the best ways to monitor whether these developers are adhering to a GenAI oversight regime would be to ensure that individuals working within such companies have strong whistleblower protections.[194] The price of offering such companies a degree of running room to develop their products in a looser, more standards-based approach is that those with inside information should be able to come forward to report misconduct without fear of retaliation.

V. CONCLUSION

Far ahead of policymakers, legislators, and regulators, courts have been thrust at the forefront of efforts to explore effective ways to oversee GenAI use. While most federal judges have utilized *ex post* punishments for improper GenAI use, some have explored ways to develop *ex ante* rules that may prove effective in deterring disfavored conduct before it happens. Many of these efforts reflect the hallmarks of New Governance Theory. Admittedly, it is too early to tell whether these interventions will prevent GenAI misuse in the courts more effectively than their counterparts: more traditional, after-the-fact punishments. Regardless, these innovations reflect an organic, decentralized, standards-based approach to regulating GenAI that might prove fruitful in both this context and others. When regulators consider ways to rein in disfavored conduct involving GenAI, they can be guided by these judicial efforts that bear New Governance Theory's hallmarks.

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[193] On effective approaches in disclosure-based regimes, see Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 579–95 (2014).

[194] *See* Lobel, *supra* note 187, at 1250–67 (describing value of whistleblower protection in legal regimes).