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.

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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

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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

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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]

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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

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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]

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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]

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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

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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]

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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%20s tanding%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]

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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

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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

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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]

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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

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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.

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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]

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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

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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

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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

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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

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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

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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.

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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

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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.

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194. ROBERTS, *supra* note 1.