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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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

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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,

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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

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.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

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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

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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,

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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

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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.az courts.gov/Portals/22/admorder/Orders24/2024-33.pdf?ver=Wga82VXaI00ghnR azZUqWA%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

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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

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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

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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

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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),

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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 cre-
ating presentations.[146]

    That same month, the Conference of State Court Ad-
ministrators (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 im-
plications 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 gener-
ative 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 im-
portant 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 technol-
ogy (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-intellig
ence-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

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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

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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

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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

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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

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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

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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

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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

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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' bi-
ases, deepen their own views, and enrich their ap-
preciation 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 prov-
ince 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 thor-
oughly 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, im-
partiality, 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

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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

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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

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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

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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

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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

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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 out-
puts" 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, us-
ing them "strategically to reverse-engineer a preferred
answer" by manipulating queries.[224] Finally, Judge New-
som 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 pro-
vide "additional datapoints to be used alongside diction-
aries, canons, and syntactical context in the assessment
of terms' ordinary meaning."[227] Essentially, Judge New-
som 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 en-
gage 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 atti-
tudes toward AI are shifting from indifference or out-
right hostility to curiosity, a new concern emerges. Does
the use of AI resources fall outside the bounds of

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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

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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 opin-
ion's appendix) echoed the initial results and "coa-
lesce[d], substantively, around a common core—there
was an objectively verifiable throughline."[237] Judge New-
som 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 under-
score 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 mis-
take my missives for a suggestion that AI can bring sci-
entific certainty to" judicial interpretation.[242] He also
was quick to dispel any notion "that we give up on tradi-
tional interpretive tools—dictionaries, semantic canons,
etc."[243] However, he reaffirmed his belief that AI tools
"may well serve a valuable auxiliary role" in determining

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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.

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246. *Id.*