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Our AI, Ourselves: Illuminating the Human Fears Animating Early Regulatory Responses to the Use of Generative AI in the Practice of Law

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ARTICLE

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Abstract. Generative artificial intelligence is changing the way lawyers work, and with those changes have come questions and concerns about how it should be regulated. Those questions and concerns, particularly on the individual level, are driven by fears about the implications of the use of generative AI. This Article identifies and explores the fears that drive these regulatory responses: fear of exposing judicial fallibility, anxiety over AI replacing human lawyers, and concerns about missing out on AI's potential benefits. Ultimately, effective regulation of the use of generative AI in legal practice needs to be attentive to the fears and hopes surrounding generative AI in law. Only by understanding the very human anxieties regarding generative AI can the profession craft effective regulatory models that address the integration of AI in legal practice.

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ARTICLE CONTENTS

I. INTRODUCTION

Generative artificial intelligence[1] is already changing the way lawyers work,[2] and the fragmented mechanisms of attorney regulation are already mobilizing in response. Judges,[3] regulators,[4] ethics committees,[5] and commentators have already begun to critique the use of generative AI; suggest—or promulgate—guidelines for permissible activities; and threaten punishment for violators.[6] Enthusiasm for the upside potential of the

1. This term is defined *infra* note 20 and accompanying text.

2. *See, e.g.*, LEXISNEXIS, GENERATIVE AI & THE LEGAL PROFESSION 2023 SURVEY REPORT 3 (2023), https://lnlp.widen.net/s/mvgdgfhkdb/2023-gen-ai-full-survey-report [https://perma.cc/NH46-XWZA] (summarizing the impact of generative AI in legal practice).

3. Judicial views are apparent both from the limited number of judicial decisions addressing lawyers inappropriately using generative AI and from judges that have issued standing orders regarding the matter. These are discussed *infra* notes 66–74 and accompanying text.

4. *See generally* N.Y. STATE BAR ASS'N, REPORT AND RECOMMENDATIONS OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON ARTIFICIAL INTELLIGENCE 7 (2024) [hereinafter NYSBA REPORT] (analyzing the role of artificial intelligence from the legal perspective and offering recommendations for regulation); THE STATE BAR OF CAL. STANDING COMM. ON PRO. RESP. AND CONDUCT, PRACTICAL GUIDANCE FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE PRACTICE OF LAW 1 (2023) [hereinafter PRACTICAL GUIDANCE] ("Like any technology, generative AI must be used in a manner that conforms to a lawyer's professional responsibility obligations . . . ."); N.J. SUP. CT. COMM. ON A.I. AND THE COURTS, NOTICE TO THE BAR, LEGAL PRACTICE: PRELIMINARY GUIDELINES ON THE USE OF ARTIFICIAL INTELLIGENCE BY NEW JERSEY LAWYERS 1 (2024) [hereinafter NEW JERSEY GUIDELINES] (guiding New Jersey legal practitioners on the use of AI); COURTS AND TRIBUNALS JUDICIARY, ARTIFICIAL INTELLIGENCE: GUIDANCE FOR JUDICIAL OFFICE HOLDERS 2 (2023) [hereinafter UK JUDICIAL GUIDE], https://www.judiciary.uk/wp-content/uploads/2023/12/AI-Judicial-Guidance.pdf [https://perma.cc/W6RQ-F2Y9] (providing guidance for courts in the UK).

5. *E.g.*, Fla. Bar Ethics Op. 24–1 (2024) [hereinafter Fla. Ethics Op.] (setting out guidance for Florida lawyers on the use of generative AI). "Lawyers may use generative artificial intelligence ('AI') in the practice of law but must protect the confidentiality of client information, provide accurate and competent services, avoid improper billing practices, and comply with applicable restrictions on lawyer advertising." *Id.*; *see also* D.C. Bar Ethics Op. 388 (2024) [hereinafter D.C. Ethics Op.] (analyzing the many ways attorneys use AI and the ethical considerations triggered by that use).

6. In one notable example, the United States Court of Appeals for the Fifth Circuit proposed a rule governing the use of AI before it. The Court, after soliciting comment on its proposed rule, decided not to adopt it. United States Court of Appeals Fifth Judicial Circuit, *Court Decision on Proposed Rule*, [hereinafter *Court Decision on Proposed Rule*], https://www.ca5.uscourts.gov/docs/default-source/default-document-library/court-decision-on-proposed-rule.pdf?sfvrsn=5967c92d_2 [https://perma.cc/JBH9-EZ8F].

technology[7] vies with concerns about when and whether it is advisable—or even proper—to use it at all.[8]

Some are eager to embrace it, insisting generative AI is the future of legal practice and, at some point soon, basic competence (as well as the need to control the cost of legal services) will require its use.[9] Others want to condemn, limit, or control it.[10] And those who want to permit, but manage, the use of generative AI are of different opinions about how to do that. Some argue that concerns about the use of generative AI can be addressed effectively using existing rules of professional conduct,[11] while others insist

7. Nicole Black, *Artificial Intelligence Tools for Brief Writing and Analysis are a Small Firm Litigator's New Best Friend,* A.B.A. J. (May 24, 2024, 10:17 AM), https://www.abajournal.com/columns/article/a-small-firm-litigators-new-best-friend-ai-tools-for-brief-writing-and-analysis [https://perma.cc/2RLY-CZNA] ("AI tools are rapidly changing how legal professionals work with documents . . . . By automating tasks such as drafting, editing and analyzing briefs, AI software saves time and reduces the burden of repetitive work. These advancements enable lawyers to focus more on strategic tasks and client interactions . . . ."); Patrick Smith, *Sullivan & Cromwell's Investments in AI Lead to Discovery, Deposition 'Assistants',* THE AM. LAW. (Aug. 21, 2023, 5:00 AM), https://www.law.com/americanlawyer/2023/08/21/sullivan-cromwell-investments-in-ai-lead-to-discovery-deposition-assistants/?slreturn=2025020541006 [https://perma.cc/MH9W-VNFS] ("'My dream,' said Sullivan & Cromwell senior chair Joe Shenker, 'is that an AI machine sits with every firm lawyer at deposition or trial, having digested the case already, and listens to the testimony, seeking for truthful or false answers, and then suggests questions for the lawyers.'").

8. The enthusiasm for the future potential of the technology may somewhat outstrip what the technology can currently do. The caveats come from testing that suggests even generative AI tools trained on existing legal databases can hallucinate and make errors. Isha Marathe, *Updated Stanford Report Finds High Hallucination Rates on Westlaw AI,* LEGALTECH NEWS (June 4, 2024, 6:18 PM), https://www.law.com/legaltechnews/2024/06/04/updated-stanford-report-finds-high-hallucination-rates-on-westlaw-ai/ [https://perma.cc/X24M-D4QV] (commenting on a Stanford study that found that Westlaw's AI tool hallucinated 33% of the time and provided accurate answers 42% of the time, while Lexis's AI tool hallucinated 17% of the time and provided correct answers 65% of the time). Perhaps as a result, some firms are hesitant. *See* Danielle Braff, *While Some Firms Embrace Generative AI Tools, Others Approach With Caution*, A.B.A. J. (June 1, 2024, 2:30 AM) https://www.abajournal.com/magazine/article/while-some-law-firms-have-embraced-generative-ai-tools-others-approach-with-caution [https://perma.cc/3YXV-S7EV] (showing differing approaches to AI integration).

9. *See* Andrew M. Perlman, *The Legal Ethics of Generative AI*, 57 SUFFOLK U. L. REV. 345, 360 (2024) (arguing not only may AI be used ethically but at some point the duty of competence will demand its use); D.C. Ethics Op.*, supra* note 5 ("Indeed, there may come a time when lawyers' use of GAI is standard practice.").

10. *See, e.g.*, Standing Order Governing Civil Cases 11, S.D. Ohio, Newman, J. (Dec. 18, 2023) [hereinafter Judge Newman Standing Order], https://www.ohsd.uscourts.gov/sites/ohsd/files//MJN%20Standing%20Civil%20Order%20eff.%2012.18.23.pdf [https://perma.cc/FDJ7-QK8U] (imposing an outright prohibition on the use of generative AI).

11. PRACTICAL GUIDANCE, *supra* note 4, at 1 (using the preexisting rules of professional responsibility to set guidelines for legal professionals using generative AI); NEW JERSEY GUIDELINES, *supra* note 4, at 3 ("The core ethical responsibilities of lawyers, as outlined in the Rules of Professional

this new technology requires new regulation to cabin it within acceptable professional boundaries.[12]

Because the technology and its capacity are developing at a rapid rate, it is early for definitive conclusions about how the rules of professional conduct should regulate its use.[13] But these early reactions—which range

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Conduct (RPCs) are unchanged by the integration of AI in legal practice, as was true with the introduction of computers and the internet."); *see also* New Mexico Formal Ethics Op. 2024-004, at 2 (2024) (explaining lawyers who choose to use generative AI "must do so responsibly, recognizing that the use of generative AI does not change their fundamental duties under the Rules of Professional Conduct"); West Virginia Legal Ethics Opinion 24-01, at 8 (2024) (noting "while there is nothing inherently improper in using AI or generative AI, a lawyer's duties to their clients, the courts, and the profession under the Rules of Professional Conduct remain unaltered."); Thy Vo, *Regulators Say Attys Hit for AI Use Have Themselves to Blame*, LAW 360 (May 30, 2024, 10:39 PM), https://www.law360.com/pulse/articles/1842532/regulator-says-attys-hit-for-ai-use-have-themselves-to-blame [https://perma.cc/3WG6-STGE] (quoting one panelist saying "recent disciplinary action against lawyers for filing briefs with fake case citations generated by ChatGPT indicates a 'lawyer problem' rather than issues with the technology" and another stating existing rules adequately addressed concerns about the ethical implications of generative AI in the practice of law). After an initial attempt to draft a rule governing the use of AI before it, the U.S. Court of Appeals for the Fifth Circuit decided not to do so. Its brief statement announcing this decision made clear that existing rules governed some of the behavior with which it was concerned:

> 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.

Court Decision on Proposed Rule, *supra* note 6.

A number of comments submitted to the court in response to the proposed rule indicated that lawyers believed that the conduct the rule purported to govern were already addressed by existing rules. *See* Nate Raymond, *Lawyers Voice Opposition to 5th Circuit's Proposed AI Rule*, REUTERS (Jan. 29, 2024, 3:43 PM), https://www.reuters.com/legal/transactional/lawyers-voice-opposition-5th-circuits-proposed-ai-rule-2024-01-29/ [https://perma.cc/EW4T-5TSH] (explaining how some lawyer commentators suggest existing obligations are sufficient to regulate AI usage).

12. *See* THE STATE BAR OF CAL., OPEN SESSION AGENDA ITEM 60-1 NOV. 2023 at 1 (Nov. 16, 2023) [hereinafter OPEN SESSION AGENDA ITEM] ("COPRAC recognizes that generative AI is a rapidly evolving technology that presents novel issues that might necessitate new regulation and rules in the future.") For an argument that Rule 11 does not adequately address the issues posed by the use of generative AI in court submissions, see Jessica R. Gunder, *Rule 11 is No Match for Generative AI*, 27 STAN. TECH. L. REV. 308, 348 (2024) ("the ill-informed use of generative Al technology will typically evade Rule 11 sanctions.").

13. NEW JERSEY GUIDELINES, *supra* note 4, at 3 ("These circumstances necessitate interim guidance on the ethical use of AI, with the understanding that more detailed guidelines can be developed as we learn more about its capacities, limits, and risks.").

from the calm to the agitated and everything in between[14]—are nonetheless valuable for a different reason. True, these early reactions will not be much use as a means of predicting what generative AI will look like in the legal sphere in the near and distant future. But they have much to tell us about the speakers, regulators, criticizers, and commentators *themselves*. They provide valuable insights into how the human element of the legal system actually works, and the fears that generative AI will alter that legal landscape, with profound effects on judges, lawyers, and clients.

Lawyers are afraid that generative AI is being invited to do work that only humans can do. They are worried it will cost them their jobs, but more than that, they are afraid its use devalues their training, experience, and expertise and minimizes the importance of their life's work.[15] Judges are afraid generative AI will reveal the fallacy of judicial omniscience and the profound reliance judges place on litigants before them to cite (existing) law correctly.[16] Others are worried regulating and restricting the use of generative AI will interfere with what some perceive as the vast capacity of generative AI to do good—to make lawyers' lives easier, improve the quality of legal work, and improve access to justice.[17]

To manage the inevitable integration of generative AI into the practice of law, regulators need to take account of these profound fears, recognize the human anxieties that motivate them, and begin to craft models that address them. There is some irony in the fact emotion is driving the profession's reaction to generative AI. The technology feels no fear, but the dramatic

14. *See* Maura R. Grossman et al., *Is Disclosure and Certification of the Use of Generative AI Really Necessary*?, 107 JUDICATURE, no. 2, 2023, at 68, 69 ("The news abounds with articles on the promises—and perils—of generative AI (GenAI) applications like ChatGPT, which create text or other content based on patterns learned from their training input. Depending on the writer's perspective, the future appears to be either utopian or dystopian in nature.").

15. Existential concerns about the value of work in the generative AI era are not limited to lawyers. For examples in the academic sphere, see, e.g., Beth McMurtrie, *Professors Ask: Are We Just Grading Robots*?, THE CHRON. OF HIGHER EDUC. (June 13, 2024), https://www.chronicle.com/article/professors-ask-are-we-just-grading-robots [https://perma.cc/ZS2E-6D7Q] (interviewing a university professor who described the popularity of AI among students as "devastating," and pointing to the time he now spends "grading fake papers").

16. *See* Perlman, *supra* note 9, at 359 ("[G]enerative artificial intelligence is the product of programming devised by humans who did not have to swear [an attorney's] oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States . . . ."(quoting Judge Brantley Starr)).

17. *See generally id.* at 356–59 (illustrating the counterintuitive nature of bans on AI in the legal field and pointing out common fallacies used by proponents of the bans).

and fervent reactions we have seen to the first steps in integrating generative AI into the practice of law are nothing if not quintessentially human.

II. IDENTIFYING THE PROBLEM

A. *Defining "Generative Artificial Intelligence"*

Before we can consider how to regulate the use of generative artificial intelligence in the practice of law, we need some agreement about what this emerging technology is. The term "artificial intelligence," standing alone, does not really capture the concerns motivating this Article. Indeed, some commentators suggest that "prohibiting" AI will interfere with a vast array of technologies already in use.[18] What concerns those worried about AI appears to be generative AI, and more specifically, generative AI that uses prompts to generate written drafts of legal documents.[19]

Merriam-Webster defines "generative artificial intelligence" as "artificial intelligence . . . that is capable of generating new content (such as images or text) in response to a submitted prompt (such as a query) by learning from a large reference database of examples."[20] As the definition suggests, generative AI creates "new content"—it does not simply find and reproduce existing content.[21] Most generative AI tools being used in law practice are a category of generative AI based on "large language models," or LLMs.[22] LLMs are trained on large datasets of language and respond to prompts by generating text based on predictions about what words should come next.[23] Inherent in that definition lies the concerns about its use: generative AI has the capacity to create new content, but that content may not contain or rely

18. *Id.* at 356 (arguing bans on AI are "dramatically overbroad" and would prohibit the use of "most types of professional productivity software, such as Microsoft Word, Outlook, and Gmail, given that most of these tools perform tasks (like spellchecking and grammar checking) that used to require human-level intelligence").

19. *See id.* at 358 (citing recent disclosure regulations applied in some courts when drafting documents with AI).

20. *Generative AI,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/generative%20AI [https://perma.cc/4XZ8-H7WF].

21. *Id.*

22. Matthew Burtell & Helen Toner, *The Surprising Power of Next Word Prediction: Large Language Models Explained, Part I*, CSET (March 8, 2024), https://cset.georgetown.edu/article/the-surprising-power-of-next-word-prediction-large-language-models-explained-part-1/ [https://perma.cc/9Z5M-T677] ("Large language models (LLMs), [are] the technology that powers generative artificial intelligence (AI) products like ChatGPT . . . .").

23. *See id.* (explaining how large language models are trained).

on truthful and authoritative sources.[24] Early efforts at getting AI to rely on a specific set of vetted authorities in generating its responses to prompts—known as "retrieval augmented generation"—have not yet solved concerns with regard to the validity of content generated by generative AI.[25]

B. *Generative Artificial Intelligence in Action:* Mata v. Avianca

The legal community's concerns about generative AI have been triggered by some highly visible failures, where lawyers relied on the technology to do something it was not capable of doing correctly.

The most notorious example is the case of *Mata v. Avianca*.[26] Mata, a passenger on an Avianca flight, claimed he had been struck by a metal cart and suffered an injury.[27] Mata brought a lawsuit in state court.[28] Avianca removed the case to federal court, then asserted Mata's claim was time-barred and moved to dismiss.[29]

Mata's attorney, Steven A. Schwartz, was a state court practitioner not admitted to practice in the federal district court.[30] Once the case was removed, he could not appear on behalf of his client, so he asked a colleague at his firm, Peter LoDuca, to appear in his stead.[31] Schwartz nonetheless

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24. Jon M. Garon, *Ethics 3.0—Attorney Responsibility in the Age of Generative AI*, BUS. LAW., Winter 2023–2024, at 209, 215.

> Because generative AI is trained to see patterns and provide pleasing patterns to the user, it is excellent at providing text with an air of authority. But unless the system also uses some form of extractive AI to validate its response against known sources and limit its identification of facts to those found in external, verified information sets, generative AI is simply non-factual.

Id.

25. *See* Marathe, *supra* note 8 (explaining the "need for third-party evaluation" of legal AI systems (quoting Mike Dahn)).

26. Mata v. Avianca, Inc., 678 F. Supp. 3d 443 (S.D.N.Y. 2023); Garon, *supra* note 24, at 215 ("*Mata* feels apocryphal, a campfire story for legal writing faculty to scare first-year law students to properly check their sources and Shepardize their cases before submitting their work to any professor or court. But the concern is real and growing.").

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

28. *Id.*

29. *Id.*

30. Federal district courts require attorneys seeking to appear before them to be admitted. Attorney Schwartz was not only not admitted to practice in the district court but he claimed to have had so little experience with or knowledge about federal litigation that, according to the court, "at the sanctions hearing, Mr. Schwartz testified that he thought a citation in the form 'F.3d' meant 'federal district, third department.'" *Id.* at 452–53. The court found this not to be credible given Schwartz's 30 years of litigation experience and the fact he contradicted himself in later testimony. *Id.* at 453 n.6.

31. *Id.* at 449.

continued to do all the substantive legal work.[32] He prepared the submission to the court, captioned an "Affirmation in Opposition" to the Motion to Dismiss.[33] LoDuca submitted the document without verifying the sources Schwartz cited. Two weeks later, Avianca's counsel filed a reply memorandum, noting seven cases cited in the plaintiff's "Affirmation in Opposition" could not be located and appeared not to exist.[34]

As it turned out, Schwartz had used ChatGPT, a generative AI tool, to draft the opposition without being aware of how it worked or what it could and could not do. Instead of confessing his error in response to the defense's allegations in the reply brief, Schwartz doubled down, preparing a submission to the court purporting to include most of the nonexistent cases.[35] The court painstakingly went through that submission, demonstrated the sources submitted did not exist, and concluded they had been generated by ChatGPT.[36]

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32. *Id.* ("Mr. LoDuca has explained that because Mr. Schwartz is not admitted, Mr. LoDuca filed the notice of appearance while Mr. Schwartz continued to perform all substantive legal work.").

33. *Id.* at 450 n.2. (describing Plaintiff's actions as contrary to the federal district court's requirement of a memorandum of law).

34. *Id.* at 450.

35. Again, Schwartz prepared the submission and LoDuca submitted it to the court without further inquiry or scrutiny. Schwartz testified he did not have access to a database that could do effective federal law research, and that after failing to find any useful caselaw on the database to which he had access, he turned to ChatGPT, stating, "I heard about this new site which I assumed—I falsely assumed was like a super search engine called ChatGPT," and used it to seek support for his legal arguments. *Id.* at 456.

36. *Id.* at 453–56 (citations to transcripts omitted). The court was presented with and reproduced the series of prompts the lawyer had used, and that resulted in the production of nonexistent case citations. The court described how Mata's lawyer had proceeded:

> His first prompt stated, "argue that the statute of limitations is tolled by bankruptcy of defendant pursuant to [M]ontreal convention." ChatGPT responded with broad descriptions of the Montreal Convention, statutes of limitations and the federal bankruptcy stay, advised that "[t]he answer to this question depends on the laws of the country in which the lawsuit is filed" and then stated that the statute of limitations under the Montreal Convention is tolled by a bankruptcy filing. ChatGPT did not cite case law to support these statements. Mr. Schwartz then entered various prompts that caused ChatGPT to generate descriptions of fake cases, including "provide case law in support that statute of limitations is tolled by bankruptcy of defendant under montreal convention," "show me specific holdings in federal cases where the statute of limitations was tolled due to bankruptcy of the airline", "show me more cases" and "give me some cases where the montreal convention allowed tolling of the statute of limitations due to bankruptcy". When directed to "provide case law", "show me specific holdings", "show me more cases" and "give me some cases", the chatbot complied by making them up.

Id. at 456–57.

Schwartz's testimony at the subsequent sanctions hearing made clear he had no idea how the technology worked. He stated "that when he reviewed the reply memo, he was 'operating under the false perception that this website [i.e., ChatGPT] could not possibly be fabricating cases on its own.'"[37] He went on, "I just was not thinking that the case could be fabricated, so I was not looking at it from that point of view. My reaction was, ChatGPT is finding that case somewhere. Maybe it's unpublished. Maybe it was appealed. Maybe access is difficult to get. I just never thought it could be made up."[38]

The court sanctioned the lawyers, requiring they pay a $5000 fine and send the court's opinion in the case to their client as well as to any judge to whom any nonexistent opinion cited in the submission had been attributed.[39]

The case unleashed a torrent of commentary about the use of generative AI in litigation and triggered some moves to regulate use.[40]

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37. *Id.* at 451 (quoting the testimony of Mr. Schwartz).

38. *Id.* Schwartz apparently asked ChatGPT if the citations it had provided were "real." An affidavit he submitted to the court:

> [I]ncluded screenshots taken from a smartphone in which Mr. Schwartz questioned ChatGPT about the reliability of its work (e.g., "Is Varghese a real case" and "Are the other cases you provided fake"). . . . ChatGPT responded that it had supplied "real" authorities that could be found through Westlaw, LexisNexis and the Federal Reporter.

Id. at 458 (internal citations omitted).

39. *Id.* at 466 ("Within 14 days of this Order, Respondents shall send via first-class mail a letter individually addressed to plaintiff Roberto Mata that identifies and attaches this Opinion and Order, a transcript of the hearing of June 8, 2023 and a copy of the April 25 Affirmation, including its exhibits."). The court required counsel to send a similar letter to "each judge falsely identified as the author" of the fake opinions cited in their submission, along with the same enclosures, and to file copies of those letters with the court. *Id.* The court imposed the sanctions under both Rule 11 of the Federal Rules of Civil Procedure and its inherent authority. *Id.*

40. *See generally* Perlman, *supra* note 9, at 346–55 (debating the ethical considerations of using AI in litigation); *see, e.g.*, Judge Newman Standing Order, *supra* note 10, at 11 (barring the use of AI in preparation for litigation).

Mata is one of a number of situations[41] where lawyers mistakenly cited phantom decisions offered to them by a generative AI product.[42] These extreme situations[43] seem unlikely to recur frequently. Now that the capacities and limitations of these tools have been broadcast widely to

41. In *Ex Parte Lee*, the defendant's brief included nonexistent citations and jump cites into irrelevant cases. *Ex Parte* Lee, 673 S.W.3d 755, 756 (Tex. App.—Waco Jul. 19, 2023, no pet.). The court affirmed the trial court's denial of Lee's Application for Writ of Habeas Corpus and noted the possibility that AI had been used to prepare the brief. *Id.* at 757, 757 n.2. The court ultimately concluded,"Because we have no information regarding why the briefing is illogical, and because we have addressed the issue raised on appeal, we resist the temptation" to pursue the matter further. *Id.* at 757 n.2.

42. One prominent incident involved Michael Cohen, who, convicted of tax fraud after a guilty plea, sought repeatedly to reduce his sentence based on his claimed cooperation in the prosecution of Donald Trump. United States v. Cohen, 724 F. Supp. 3d 251, 253–54 (S.D.N.Y. 2024). In his third attempt at a reduction of his time on supervised release, his lawyer submitted to the court a memo which, in the court's words, "cited and described three 'examples' of decisions granting early termination of supervised release that were allegedly affirmed by the Second Circuit. There was only one problem: The cases do not exist." *Id.* at 254 (citations omitted). The government failed to bring this to the court's attention, but upon joining the case, Cohen's subsequent attorney disclosed to the court that she had been "unable to verify" the cases included in the submission. *Id.* The court concluded Michael Cohen, the client, had "obtained" these cases using Google Bard and had believed them to be real cases. *Id.* at 254–55.

> Cohen had obtained the cases and summaries from Google Bard, which he "did not realize" . . . was a generative text service that, like Chat-GPT, could show citations and descriptions that looked real but actually were not. Instead, [he had] understood it to be a super-charged search engine . . . .

Id. (citations omitted). The court concluded no one had engaged in the bad faith necessary to impose sanctions; original counsel erroneously believed successor counsel had found the case citations. *Id.* at 258–59. "[Counsel's] citation to non-existent cases is embarrassing and certainly negligent, perhaps even grossly negligent. But the Court cannot find that it was done in bad faith." *Id.* at 258. No sanctions were accordingly imposed. *Id.* at 260. For another example, see Park v. Kim, 91 F.4th 610, 615–16 (2d Cir. 2024) (per curiam) (referring to the grievance committee a lawyer who cited a nonexistent case in a reply brief and who told the court she obtained the citation from ChatGPT).

43. *See* David Wagner, *This Prolific LA Eviction Law Firm Was Caught Faking Cases in Court. Did They Misuse AI?*, LAIST (Oct. 12, 2023, 5:00 AM), https://laist.com/news/housing-homelessness/dennis-block-chatgpt-artificial-intelligence-ai-eviction-court-los-angeles-lawyer-sanction-housing-tenant-landlord [https://perma.cc/49PU-LQ6Z] (discussing a case in which a prominent landlord-side eviction law firm was sanctioned for submitting a court filing that included a number of irrelevant case cites and two cites to nonexistent cases). The attorney who appeared in court to respond to the judge's concerns about the submission said the attorney responsible for drafting the filing "relied on 'online research.' He said 'she didn't check it,' and that she had since left the firm." *Id.* In a separate filing, the attorney was identified "as a first-year lawyer admitted to the bar in November 2022" who was "unfairly put . . . under a lot of pressure to get things out the door." *Id.*

lawyers in the context of a few high-profile failures, lawyers will probably not make precisely these mistakes again. They will, of course, make others.[44]

Lawyers using generative AI may be the least of the courts' problems; use of these tools by pro se litigants is likely to pose a more significant concern.[45] Lawyers presumably know how to locate appropriate authority, cite it, and verify the legitimacy of any sources generative AI suggests to them. Pro se litigants, by contrast, may not understand the possibility that generative AI is providing them with nonexistent authority and, in addition, may lack the resources or knowledge to determine the legitimacy of that authority before relying on it.[46] Courts do sanction pro se litigants for citing nonexistent

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44. Some might assume this problem will not arise with tools provided by legal database services, which rely on what is known as "retrieval augmented generation," meaning the generative AI tool is supposed to look exclusively to that database for sources to use in response to prompts. While in theory, such services should avoid hallucination, it does not prevent them from making errors, as studies have shown. For a discussion of those studies, see *supra* note 8.

45. *See, e.g.*, Al-Hamim v. Star Hearthstone, LLC, 564 P.3d 1117, 1120 (2024) ("Some self-represented litigants . . . have relied on GAI tools to draft court filings, only to discover later to their chagrin that their filings contained hallucinations."). Plaintiff Alim Al-Hamim brought suit against his landlords, claiming, *inter alia*, they breached the warranty of habitability. *Id.* at 1120. Al-Hamim appeared pro se in the litigation. *Id.* In his opening brief, he cited eight, in the words of the Court of Appeals, "fake cases." *Id.* at 1123. The court attempted to locate the cases; when it could not, it ordered Al-Hamim to provide them or, if they were the product of "GAI hallucinations," to show cause why he should not be sanctioned. *Id.* Al-Hamim admitted he had relied on AI to "assist" him in preparing the brief and conceded that the cases were hallucinations. *Id.* Concluding that the question of the appropriate consequence for a pro se litigant submitting hallucinated authorities to the court was a matter of first impression, the court declined to impose sanctions on Al-Hamim. *Id.* at 1125–26. It warned, however, "A lawyer's or a self-represented party's future filing in this court containing GAI-generated hallucinations may result in sanctions." *Id.* at 1126. *See also* Mojtabavi v. Blinken, No. SA CV 24-1359 PA (ASx), 2024 U.S. Dist. LEXIS 225418, *7 (C.D. Cal. Dec. 12, 2024) (pro se plaintiff's case under the Administrative Procedure Act dismissed where "[n]ot a single one" of the citations to caselaw in Plaintiff's brief corresponded to the given case name). The court had previously warned plaintiff that the use of a "text-generative artificial intelligence tool . . . that has generated fake case citations . . . is unacceptable" and warned of the possibility of dismissal if the plaintiff violated the rules in future. *Id.* at *8 (quoting the prior dismissal order).

46. This issue was specifically raised in the UK's guidance for tribunals. *See* UK JUDICIAL GUIDE, *supra* note 4, at 5 ("AI chatbots are now being used by unrepresented litigants. They may be the only source of advice or assistance some litigants receive. Litigants rarely have the skills independently to verify legal information provided by AI chatbots and may not be aware that they are prone to error. If it appears an AI chatbot may have been used to prepare submissions or other documents, it is appropriate to inquire about this, and ask what checks for accuracy have been undertaken (if any).").
The report suggested specific "[i]ndications that work may have been produced by AI" including:

- references to cases that do not sound familiar, or have unfamiliar citations (sometimes from the US)
- parties citing different bodies of case law in relation to the same legal issues

caselaw,[47] but isolated sanctions and reputational injury are unlikely to constrain this conduct for self-represented parties in the way it will for lawyers. Courts may need to develop more robust ways of ensuring the validity of the caselaw proffered by pro se litigants,[48] and some are already

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• submissions that do not accord with your general understanding of the law in the area
• submissions that use American spelling or refer to overseas cases, and
• content that (superficially at least) appears to be highly persuasive and well written, but on closer inspection contains obvious substantive errors.

Id. at 6. *See also* Grossman et al., *supra* note 14, at 73 ("For the time being . . . pro se filers will likely not have access—and may never have access—to the paid databases and specialized technologies used by lawyers and will instead turn to free, general-purpose GenAI systems (like ChatGPT 3.5).").

47. *See, e.g.,* Kruse v. Karlen, 692 S.W.3d 43, 46 (Mo. Ct. App. 2024) (ordering a pro se litigant to pay $10,000 in damages when numerous artificial intelligence hallucinations were found in Appellant's Brief). Karlen, a pro se appellant, violated a number of the rules of appellate procedure. *Id.* at 47. The court was especially troubled by his citation of nonexistent authority: "Particularly concerning to this Court is that Appellant submitted an Appellate Brief in which the overwhelming majority of the citations are not only inaccurate but entirely fictitious. Only two out of the twenty-four case citations in Appellant's Brief are genuine." *Id.* at 48. In a subsequent filing,

> Appellant apologized for submitting fictitious cases and explained that he hired an online "consultant" purporting to be an attorney licensed in California to prepare the Appellate Brief. Appellant indicated that the fee paid amounted to less than one percent of the cost of retaining an attorney. Appellant stated he did not know that the individual would use "artificial intelligence hallucinations" and denied any intention to mislead the Court or waste Respondent's time researching fictitious precedent.

Id. at 51. The court nonetheless dismissed the appeal and imposed an attorney's fee sanction, explaining:

> [T]he facts before us present a much more serious and fundamental issue than poor briefing. Appellant's actions in pursuing this appeal have required Respondent to expend more resources than necessary to decipher the record and arguments as well as to identify the fictitious cases Appellant wrongly presented to this Court. Respondent was compelled to file the necessary briefing, arguments, and supplemental legal file and appendix as well as attend oral argument for an appeal that wholly lacked merit. For these reasons, an award to Respondent of partial appellate attorneys' fees and expenses is warranted.

Id. at 54 (citation omitted). The case was discussed in the press. Rudi Keller, *Missouri Appeals Court Fines Litigant After Finding Fake, AI-Generated Cases Cited in Filings*, MO. INDEP. (Feb. 13, 2024, 11:23 AM), https://missouriindependent.com/2024/02/13/missouri-appeals-court-fines-litigant-after-finding-fake-ai-generated-cases-cited-in-filings/ [https://perma.cc/LJS2-ZWA2].

48. *See* Grossman et al., *supra* note 14, at 76 (suggesting pro se litigants be required to disclose their use of generative AI). The article explains:

> [W]e see no problem with requiring pro se litigants to disclose whether they have had any GenAI assistance in drafting their court filings. This would be similar to the mandates already imposed by certain state and local bar ethics committees that require either an attorney who has provided assistance to a party in drafting a court filing, but who has not entered an appearance as counsel

attempting to do so.[49] The upside potential for generative artificial intelligence to benefit those who lack access to lawyers makes this an important issue.[50] At the same time, the fact that litigants are pro se puts courts on notice that their legal argument may be suspect and may trigger a higher level of scrutiny of the bona fides of their submissions than lawyers might get.[51] This may explain why one proposed solution to concerns about the use of generative AI is to require that lawyers and litigants disclose when they have used generative AI in preparing a court submission.[52]

Mata and other similar cases have inspired a series of decisionmakers to think about how and whether the use of generative AI in practice should be regulated.[53] Views of what regulation should look like depend in large part

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for that party, to disclose to the court the assistance they provided, or for the pro se litigant to disclose that they received assistance in drafting the filing.

Id.

49. *See, e.g.*, *Self-Represented Litigants (SRL)*, U.S. DIST. CT.: E. DIST. OF MO., https://www.moed.uscourts.gov/self-represented-litigants-srl [https://perma.cc/Q2AD-66MS] (holding pro se litigants responsible for the contents of their submissions to the court, including any generated by AI).

50. *See, e.g.,* Marco Poggio, *Gen AI Shows Promise–And Peril–For Pro Se Litigants*, LAW360 (May 3, 2024, 8:10 PM), https://www.law360.com/pulse/articles/1812918/gen-ai-shows-promise-and-peril-for-pro-se-litigants [https://perma.cc/2EEW-A9BK] (discussing AI's potential to assist pro se litigants).

51. Analogously, Model Rule of Professional Conduct 8.3 requires lawyers to report other lawyers' misconduct to disciplinary authorities if the misconduct "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." MODEL RULES OF PROF'L CONDUCT R. 8.3 (AM. BAR ASS'N 2025). The failure to report is its own disciplinary violation, and the fact that the misbehaving lawyer has already been reported by someone else is no defense to a failure to comply with this rule. That could be viewed as simply strict enforcement of a core professional norm. Or, one might surmise that disciplinary authorities want lawyers to report other lawyers' wrongdoing because lawyers are trusted reporters. Clients who file complaints about their lawyers may simply be unhappy with the outcomes they received in their matters, or with the bedside manner of their lawyers. A lawyer reporting wrongdoing, on the other hand, may send a message to the disciplinary authorities that there is more than a disgruntled client at issue, rendering the allegations worthy of more attention. *See id.* R. 8.3 cmt. 1 ("An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover."). *But see id.* R. 8.3 cmt. 3 ("This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent.").

52. This is one of the proposals that has been suggested and imposed by some judges in their standing rules. *See infra* notes 66–74 and accompanying text.

53. Earlier suggestions that this issue was on the horizon and needed to be considered were made, but those suggestions lacked the specificity or urgency of the current moment. *See* ABA House of Delegates, Resolution 112 (Aug. 2019) (urging "courts and lawyers to address the emerging ethical and legal issues related to the usage of artificial intelligence ('AI') in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI").

on what the drafter perceives the threat to be. It is worth understanding where these proposals are coming from to better understand how to think about regulation of attorney use of generative AI going forward.

III. CONSTITUENCIES EXPRESSING VIEWS REGARDING REGULATION OF GENERATIVE AI BY LAWYERS

A cacophony of voices are already weighing in on how the use of generative AI by lawyers should be regulated. Those include a range of sources.

The first is judges who have addressed the improper use of generative AI in proceedings before them. The court in *Mata v. Avianca*, for example, crafted a specific sanction for the lawyers whose use of ChatGPT caused them to cite nonexistent authority to the court.[54] Additional incidents of this sort continue to result in statements by judges regarding the consequences of this conduct.

Another is rules regarding the use of generative AI created and imposed by individual U.S. trial-level federal judges and magistrates.[55] Those judges have the authority to issue rules, sometimes known as "standing orders," governing the conduct of lawyers who appear before them. They can do so quickly and unilaterally.[56] That quick reaction provides a clear and early indication of the problem the individual judges perceive and the way they believe it should be solved. [57]

A third is guidance on the professional responsibility consequences of using generative AI. This guidance has been generated through a variety of mechanisms. Some states have issued ethics opinions.[58] New York's

54. Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 466 (S.D.N.Y. 2023).

55. For a description of similar rules in Canada, see Grossman et al., *supra* note 14, at 71 (explaining Canadian developments in AI regulation). The article contends individual standing orders are not the optimal way to manage concerns about generative AI. *See id.* at 76 ("We believe that individualized standing orders are unnecessary, create unintended confusion, impose unnecessary burden and cost, and deter the legitimate use of GenAUI applications that could increase productivity and access to justice.").

56. These are to be distinguished from "local rules" that govern an entire court, not just a single judge. Under 28 U.S.C. § 2071(b), rules applying to an entire federal court may be "prescribed only after giving appropriate public notice and an opportunity for comment." 28 U.S.C. § 2071(b).

57. *See* Cedra Mayfield, *Judicial Crackdown: This is Why I Have a Standing Order on the Use of AI*, LAW.COM (July 27, 2023, 4:09 PM), https://www.law.com/2023/07/27/judicial-crackdown-this-is-why-i-have-a-standing-order-on-the-use-of-ai/ [https://perma.cc/SCR7-3YVT] (showing judicial efforts to control AI).

58. D.C. Ethics Op.*, supra* note 5; Fla. Ethics Op.*, supra* note 5; New Mexico Formal Ethics Op. 2024-004 (2024).

recommendations were prepared by a bar association task force;[59] California's by a standing committee of the state bar.[60] New Jersey's guidance was drafted by a Supreme Court committee.[61] Because these documents are the product of collaborative decision-making processes, they tend to be less reactive and idiosyncratic than the individual judges' rules. They also tend to offer something of a kitchen sink approach, raising and addressing, however preliminarily, a broad array of issues that relate to the use of generative AI in the practice of law.

Of course, an array of commentators, including individual lawyers, have weighed in on these issues. While the views of individual attorneys can be hard to discern, one small window into this question was created when the United States Court of Appeals for the Fifth Circuit proposed a rule regarding the use of generative AI and invited lawyers to comment on it.[62] The Fifth Circuit's proposed rule required that anyone filing a document with the court (lawyer or not) either needed to certify they had not used generative AI to prepare the document or if they had done so, that a "human" had checked to verify the accuracy of the submission.[63] The resulting comments provide an interesting window into the concerns and anxieties of the commenting lawyers.[64]

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59. NYSBA REPORT, *supra* note 4, at 7. The report is eighty-five pages, but only about fourteen pages deal with the professional responsibility implications for lawyers using generative AI. *Id.* at 29–40, 57–60. The rest meanders through the history of AI going back to the 1940s and the potential risks and benefits of the use of generative AI in legal practice. *Id.* at 11–28, 40–56.

60. OPEN SESSION AGENDA ITEM, *supra* note 12, at 2–4 (discussing issues of confidentiality, competence and diligence, duty to comply with law, duty to supervise lawyers and nonlawyers, communications with clients, billing, candor to the tribunal, and concerns about bias in the creation of generative AI).

61. NEW JERSEY GUIDELINES, *supra* note 4, at 1.

62. United States Court of Appeals Fifth Judicial Circuit, Notice of Proposed Amendment to 5th Cir. R. 32.3, [hereinafter Notice of Proposed Amendment], https://www.ca5.uscourts.gov/docs/default-source/default-document-library/public-comment-local-rule.pdf [https://perma.cc/QGH7-U5P8]. The Fifth Circuit was following the procedure set out in 28 U.S.C. § 2071(b). 28 U.S.C. § 2071(b) ("Any rule prescribed by a court, other than the Supreme Court . . . shall be prescribed only after giving appropriate public notice and an opportunity for comment.").

63. Notice of Proposed Amendment, *supra* note 62 ("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. A material misrepresentation in the certificate of compliance may result in striking the document and sanctions against the person signing the document.").

64. The sixteen comments submitted are available at COMMENTS ON PROPOSED RULE CHANGE TO FIFTH CIRCUIT RULE 32.2 AND FORM 6 (Thomson Reuters eds., 2024) [hereinafter COMMENTS], https://fingfx.thomsonreuters.com/gfx/legaldocs/dwvkeabomvm/01292024fifth_ai.p

A review of these reactions is edifying because they are motivated by fear. What the reactions tell us about what stakeholders are afraid of is valuable to understand as we contemplate how the use of generative AI in law practice can be reliably utilized, managed, regulated, and controlled.

IV. IDENTIFYING CORE CONCERNS WITH REGARD TO REGULATING THE USE OF GENERATIVE AI IN THE PRACTICE OF LAW

To begin with, most of the parties suggesting, challenging, or imposing regulations know relatively little about generative AI. Their proposals accordingly tell us more about the proposers' body of knowledge than they do about the technology to which they are responding. That being said, the responses can be categorized broadly based on some very distinct fears about the possible impact of generative AI on the practice of law.

The first is judges' fears that generative AI will reveal the fallacy of judicial omniscience. The second is that the technology poses a danger both to the livelihoods of lawyers and to the fundamental value of human thought and engagement as a critical element of the legal enterprise. The third is fear that generative AI is a valuable and essential tool that will be constrained, stigmatized, and sanctioned, depriving society of its extensive benefits.

A. *The Fear of Judicial Fallibility*

The first highly visible reactions of judges concerned about the use of generative AI in litigation practice reflect significant hostility towards the use of the tool. This view is demonstrated by the standing orders of some judges, who have profound concerns about the use of generative AI and believe it should not be used, or its use should be rigorously constrained.

The most draconian of those rules implemented so far, imposed by Judge Michael J. Newman, a federal district court judge in Ohio, prohibited outright any use of "Artificial Intelligence" in the preparation of a

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df [https://perma.cc/YTS6-RVNY] After undertaking the comment process, the court decided not to adopt the rule. *Court Decision on Proposed Rule*, *supra* note 6.

> The court, having considered the proposed rule, the accompanying comments, and the use of artificial intelligence in the legal practice, has decided not to adopt a special rule regarding the use of artificial intelligence in drafting briefs at this time. 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.

Id.

submission to his court.[65] This rule prohibits not product but process. The rule does not punish submitting false citations or poorly written briefs but using a particular tool to create them, regardless of the quality of the output.[66]

While an outright prohibition has been a rare response,[67] standing orders take a range of approaches to constraining and warning about the use of generative AI. Some require disclosure of the use of generative AI.[68] Some require a certification that if generative AI was used in preparing a document, the lawyers submitting the document have verified its accuracy.[69]

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65. *See* Judge Newman Standing Order, *supra* note 10, at 11.

> VI. ARTIFICIAL INTELLIGENCE ("AI") PROVISION
> No attorney for a party, or a pro se party, may use Artificial Intelligence ('AI') in the preparation of any filing submitted to the Court. Parties and their counsel who violate this AI ban may face sanctions including, inter alia, striking the pleading from the record, the imposition of economic sanctions or contempt, and dismissal of the lawsuit. The Court does not intend this AI ban to apply to information gathered from legal search engines, such as Westlaw or LexisNexis, or Internet search engines, such as Google or Bing. All parties and their counsel have a duty to immediately inform the Court if they discover the use of AI in any document filed in their case.

Id.

66. The rule attempts to define the nature of the prohibited tool. *Id.*

67. Other such outright prohibitions do exist, however. *See* Memorandum of Law Requirements, N.D. Ill., Coleman, J., https://www.ilnd.uscourts.gov/judge-cmp-detail.aspx?cmpid=626 [https://perma.cc/ZR8F-SDGW] ("Parties may not use Artificial Intelligence to draft their memoranda or as authority to support their motions."); Court's Standing Order on the Use of Generative AI, N.D. Ohio, Boyko, J. (Mar. 2024), https://www.ohnd.uscourts.gov/sites/ohnd/files/Boyko.StandingOrder.GenerativeAI.pdf [https://perma.cc/TSB3-9E9J] ("Pursuant to the Court's inherent authority and the authority of Rule 11 of the Federal Rules of Civil Procedure, no attorney for a party, or a pro se party, may use Artificial Intelligence ('AI') in the preparation of any filing submitted to the Court.").

68. *See* Standing Order for Civil Cases Before Magistrate Judge Peter H. Kang 10, N.D. Cal., Kang, J. (July 14, 2023), https://cand.uscourts.gov/wp-content/uploads/judges/kang-phk/Civil-Standing-Order-PHK-001.pdf [https://perma.cc/BZ2B-GRJK] ("Any brief, pleading, or other document submitted to the Court the text of which was created or drafted with any use of an AI tool shall be identified as such . . . ."); The Use of "Artificial Intelligence" in the Preparation of Documents Filed Before This Court, N.D. Ill., Cole, J., https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Cole/Artificial%20Intelligence%20standing%20order.pdf [https://perma.cc/LS28-8A2C] (requiring disclosure).

69. *See* Standing Order for Civil Cases before District Judge Araceli Martínez-Olguín 5, N.D. Cal., Martínez-Olguín, J. (Nov. 22, 2023), https://www.cand.uscourts.gov/wp-content/uploads/2023/03/AMO-Civil-Standing-Order-11.22.2023-FINAL.pdf [https://perma.cc/U3GC-HQMV] ("Any submission containing AI-generated content must include a certification that lead trial counsel has personally verified the content's accuracy. Failure to include this certification or comply with this verification requirement will be grounds for sanctions. Counsel is responsible for maintaining records of all prompts or inquiries submitted to any generative AI tools in the event those records become relevant at any point."). For orders that include both a requirement

Others require a twofold certification: either generative AI was not used, or if it was, the bona fides of the resulting document have been verified in some way.[70] Some both prohibit the use of generative AI and require a certification that the sources cited to the court have been properly verified.[71] Even judges who impose no express limits on the use of generative AI offer

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of disclosure and certification, see Judge's Procedures ¶ 14, D. Cal., Oliver, J., https://www.cacd.uscourts.gov/honorable-rozella-oliver [https://perma.cc/4MEB-JDFT] (requiring "a separate declaration disclosing the use of artificial intelligence and certifying that the filer has reviewed the source material"); Standing Order for Civil Cases Assigned to Judge Stanley Blumenfeld, Jr. 6, C.D. Cal., Blumenfeld, J. (Mar. 1, 2024), https://www.cacd.uscourts.gov/sites/default/files/documents/SB/AD/1.%20Civil%20Standing%20Order%20%283.1.24%29%20[Final].pdf [https://perma.cc/Y55K-JTGV] ("Any party who uses generative [AI] . . . must attach . . . a separate declaration disclosing the use of [AI] and certifying that the filer has reviewed . . . and verified . . . the artifically generated content['s accuracy] . . . ."); Disclosure and Certification Requirements – Generative Artificial Intelligence, D. Haw., Kobayashi, J., https://www.hid.uscourts.gov/cms/assets/95f11dcf-7411-42d2-9ac2-92b2424519f6/AI%20Guidelines%20LEK.pdf [https://perma.cc/45DA-2MPY] (requiring disclosure of the use of generative AI, including the specific tool used, and certification that the certifier has "checked the accuracy of any portion of the document drafted by generative AI"); Standing Order Regarding Use of Generative Artificial Intelligence ("AI") in Cases Assigned to Judge Pratter, E.D. Pa., Pratter, J. (May 3, 2024), https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/praso1_0.pdf [https://perma.cc/X275-LHSS] (requiring disclosure and certification); Civil Procedures/Local Rules 6, S.D. Tex., Olvera, J., https://www.txs.uscourts.gov/sites/txs/files/Judge_Olvera_Local_Rules_%28Civil%29_1-18-24_-_Amended.pdf [https://perma.cc/NUV6-95JD] (requiring certification that "no portion of any filing will be drafted by generative artificial intelligence or that any language drafted by generative artificial intelligence—including quotations, citations, paraphrased assertions, and legal analysis—will be checked for accuracy, using print reporters or traditional legal databases, by a person before it is submitted to the Court.").

70. *See, e.g.,* Standing Order for Civil Cases 5, D. Col., Crews, J. (Dec. 1, 2024), http://www.cod.uscourts.gov/Portals/0/Documents/Judges/SKC/SKC_Standing_Order_Civil_Cases.pdf?ver=dZWwhbM9VS_wbucSWUjcyQ%3d%3d [https://perma.cc/B8DZ-86WP] ("[E]very substantive motion . . . shall contain an AI Certification regarding the use, or non-use, of generative AI in preparing the filing. The preparer of the filing must certify either that (1) no portion of the filing was drafted by AI, or that (2) any language drafted by AI (even if later edited by a human) was personally reviewed by the filer or another human for accuracy and all legal citations are to actual, non-ficticious cases . . . .").

71. *See* In Re: Use of Artificial Intelligence, No. 3:24-mc-104 (W.D. N.C. June 18, 2024), https://www.ncwd.uscourts.gov/sites/default/files/Standing%20Order%20In%20Re-%20Use%20of%20Artificial%20Intelligence2.pdf [https://perma.cc/X42D-GJ89] (requiring certification that "[n]o artificial intelligence was employed in doing the research for the preparation of this document," and that "[e]very statement and every citation to an authority contained in this document has been checked by an attorney in this case and/or a paralegal working at his/her direction (or the party making the filing if acting pro se) as to the accuracy of the proposition for which it is offered, and the citation to authority provided."). This is a court rule, not an individual judge's rule, and was signed by the seven judges in the Charlotte Division. *Id.*

a warning about the possible consequences of its use.[72] And some rules require not just disclosure, but substantial detail about the nature of the generative AI used in the preparation of a submission to the court.[73]

These standing orders see in the use of generative AI a threat that lawyers will base arguments on nonexistent or improperly used legal authority, that courts will fail to detect that failure, and will decide cases in reliance on nonexistent or misstated law.

That concern is evident in *Mata v. Avianca* itself.[74] The court there, having determined that counsel for the plaintiff had submitted nonexistent authority in support of its motion, required the lawyers to send its order and a copy of the transcript of the hearing on the matter both to the named plaintiff in the case—the lawyers' client—and to any judge identified as the "author" of any of the nonexistent opinions hallucinated by ChatGPT.[75] Presumably, the publication of the judge's order has an educational purpose, both for the public and for the profession—the decision was widely read and featured prominently in the press.[76] A mistake of this magnitude also calls for disclosure to the client, given the lawyer's obligation to

72. *See, e.g.*, Standing Order for Civil Cases Before District Judge Rita F. Lin 6, N.D. Cal., Lin, J. (Sept. 18, 2024), https://www.cand.uscourts.gov/wp-content/uploads/judges/lin-rfl/2024-09-18-Civil-Standing-Order.pdf [https://perma.cc/2PSC-7Y6U] ("Use of ChatGPT or other such generative artificial intelligence tools is not prohibited, but counsel must personally confirm for themselves the accuracy of any research conducted by these means, and counsel alone bears ethical responsibility for all statements made in filings."). *See also* Case Procedures, N.D. Ill., Johnston, J., https://www.ilnd.uscourts.gov/judge_display.php?LastName=Johnston [https://perma.cc/YPH3-2P3F] ("Anyone—counsel and unrepresented parties alike—using AI in connection with the filing of a pleading, motion, or paper in this Court or the serving/delivering of a request, response, or objection to discovery must comply with Rule 11(b) and Rule 26(g) of the Federal Rules of Civil Procedure, and any other relevant rule, including any applicable ethical rule."); Judicial Policies and Procedures 3, E.D. Pa., Hodge, J., https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/hodpol.pdf [https://perma.cc/Z636-MFUU] (same).

73. *See, e.g.*, Judge Evelyn Padin's General Pretrial and Trial Procedures 2, D. N.J., Padin, J. (Feb. 20, 2025), https://www.njd.uscourts.gov/sites/njd/files/EPProcedures.pdf [https://perma.cc/AAZ8-DGTZ] ("The use of any GAI . . . for any court filings requires a mandatory disclosure/certification that (1) identifies the GAI program; (2) identifies the portion of the filing drafted by GAI; and (3) certifies that the GAI work product was diligently reviewed by a human being for accuracy and applicability.").

74. Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 451 (S.D.N.Y. 2023).

75. *Id.* at 466.

76. *E.g.*, 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 [https://perma.cc/Y4JF-MYH3].

communicate fully about the representation.[77] However, the motivation for requiring the attorney to tell judges that they have been referred to as having authored nonexistent opinions is less clear. It may be intended to put judges on notice that generative AI technology is creating and citing hallucinated opinions. Or it might be intended simply as an even more robust shaming sanction for the lawyer in question.[78]

The court was clear about why it was troubled by counsel's conduct. Counsel's use of generative AI wasted time, both the court's and that of the opposing party.[79] It had the potential to damage the reputation of judges and courts by attributing false decisions to them.[80] Perhaps most importantly, it was concerned about such embarrassments damaging the reputation of the legal profession and the judicial system.[81]

The key to the court's concern lies here. Judges hate being embarrassed. For courts, the danger is that the use of generative AI might lead them to be fooled into believing that law invented by the technology actually exists and cause them to rely on it. That could result in creating precedent that is literally gibberish.

This concern reveals the fragility of judicial omniscience. The judicial system is premised on the theory that judges know the law or that they (and their staff, if they have one) will conduct research to verify the correct analysis of a legal problem. But, of course, most judges—most of the time—do no such thing.

That is not to say judges never do independent work to apprise themselves of the law. In some areas, particularly those in which they had strong knowledge bases from their pre-judicial practice experience, judges may already know the law better than the advocates do. Experienced judges of long standing may have developed expertise in a number of areas of law. And a specific issue may inspire judges to engage in independent research (or, more likely, to dispatch law clerks to do it, if the judges have them).

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77. *See* MODEL RULES OF PROF'L CONDUCT R. 1.4 (AM. BAR ASS'N 2025) (mandating attorneys keep their clients informed).

78. *Mata,* 678 F. Supp. 3d at 466 (prioritizing deterrence with the "salutary purpose of placing the most directly affected persons on notice of Respondents' conduct").

79. *Id.* at 448 ("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.").

80. *Id.*

81. *Id.* at 448–49 ("It promotes cynicism about the legal profession and the American judicial system. And a future litigant may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity.").

For the most part, however, courts rely on lawyers to accurately apprise them of pertinent and controlling law and to properly cite and analyze it. Judges expect lawyers to do their job properly and are dependent on their output to decide cases. Contrary to what many in the public may believe, it is distinctly possible a judge may not research or verify the law in a particular case but will assume advocates' theories or cited authorities are accurate and use them in rendering decisions.[82]

The public may not know that, but judges do. Because judges are so reliant on lawyers to bring them the relevant law, litigants and their lawyers who are cavalier about citing nonexistent precedent could devastate judicial legitimacy. Protecting legitimacy in the face of the use of generative AI may not require a new rule; courts in these cases typically suggest the lawyers have violated existing rules of procedure, rules of professional responsibility, or both.[83] But this concern may explain the outrage that bad use of

82. That is the most compelling way to understand Model Rule of Professional Conduct 3.3(a)(2), which notes a violation in "fail[ing] to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (AM. BAR ASS'N 2025). Law students are surprised by this rule, which requires a lawyer to tell the tribunal about adverse law if the opponent does not; it sounds inconsistent with the lawyer's duty to advance their client's interest. It makes sense if we understand that if the lawyers do not cite governing law to the court, and the court is unaware of it, it is possible that the court, not properly advised, will make a legally incorrect and embarrassing mistake.

This may seem a purely hypothetical problem, but consider *Massey v. Prince George's County*, 907 F. Supp. 138, 139–40 (D. Md. 1995). Plaintiff sued the county, claiming police officers had violated his constitutional rights and caused him injury when they set a police canine upon him. *Id.* at 139–140. The defense moved for summary judgment, citing a relevant (but not controlling) case from the Sixth Circuit. *Id.* at 140. The defense failed to cite the controlling case in the Fourth Circuit, which held that the reasonableness of the use of the canine was a jury question not susceptible to disposition on summary judgment. *Id.* at 140–141. The county had been a defendant in that controlling case. *Id.* at 142. The plaintiff did not cite the relevant case either, and the trial court ruled in favor of the county on the summary judgment motion. *Id.* at 140. Plaintiff's counsel subsequently found the pertinent case in the controlling jurisdiction and brought it to the court's attention; the court then reversed its own decision on the matter. *Id.* at 140–41, 143. The trial judge was irked with the plaintiff's counsel for failing to locate the relevant precedent, but stated, "The action of defense counsel in this case raises a far more serious concern." *Id.* at 142. The court proceeded to investigate further, and learned the county had made dispositive motions in five excessive force cases involving police dogs in which it had not cited the controlling case. *Id.* at 143. The court indicated it would bring the matter to the attention of the judges presiding over each such case. *Id.* What was troubling to the court was not only the lawyers' potential concealment of known precedent but also that the court, in reliance on counsel's submission, made a ruling that was erroneous as a matter of law.

83. *See* Park v. Kim, 91 F.4th 610, 614–15 (2d Cir. 2024) (citing both N.Y. RULES OF PROF'L CONDUCT R. 3.3(a) (2025) and FED. R. CIV. P. 11 in discussing a lawyer who cited nonexistent case law to the court in a reply brief).

generative AI has generated in the courts and the anticipatory anxiety about whether lawyers ought to be using it at all. To these judges, use of generative AI is a profound breach of trust that threatens the legitimacy of the entire system. It should be no surprise they want to see AI misuse harshly punished and quickly cabined.

That concern is also reflected in judicial standing orders that do not preclude the use of generative AI altogether but require that its use be disclosed and its outputs verified before they are cited. For example, Judge Brantley Starr's standing order required that each attorney appearing before his court "file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence . . . or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being[.]"[84] A similar approach, taken by Judge Michael Baylson, requires both that the use of generative AI be disclosed and that lawyers independently verify the accuracy of any content it produces.[85] The latter

84. Mandatory Certification Regarding Generative Artificial Intelligence, N.D. Tex., Starr, J., [hereinafter Judge Starr Certification], https://www.texenrls.org/wp-content/uploads/2024/07/A-sampling-of-AI-Court-Orders.pdf [https://perma.cc/KN5Q-77Y5]. Judge Starr's order explained his reasoning:

> These platforms are incredibly powerful and have many uses in the law: form divorces, discovery requests, suggested errors in documents, anticipated questions at oral argument. But legal briefing is not one of them. Here's why. These platforms in their current states are prone to hallucinations and bias. On hallucinations, they make stuff up—even quotes and citations. Another issue is reliability or bias. While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle.

Id.

85. Standing Order Re: Artificial Intelligence ('AI') in Cases Assigned to Judge Baylson 1, E.D. P.A., Baylson, J. (June 6, 2023), https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf [https://perma.cc/MGN7-G7EQ]. The order states:

> If any attorney for a party, or a *pro se* party, has used Artificial Intelligence ('AI') in the preparation of any complaint, answer, motion, brief, or other paper, filed with the Court, and assigned to Judge Michael M. Baylson, **MUST**, in a clear and plain factual statement, disclose that AI has been used in any way in the preparation of the filing, and **CERTIFY**, that each and every citation to the law or the record in the paper, has been verified as accurate.

rule seems unnecessary—whether through rules of civil procedure or rules of professional responsibility, lawyers who submit authority to a court effectively assert their good faith belief in the accuracy of their submission. It is better understood as reflecting the need to put the court on notice that heightened scrutiny may be required to assure the bona fides of a lawyer's submission. These judges are worried about being fooled. They want lawyers to be aware of their obligation to gatekeep the content provided by AI to make sure they are not,[86] and they want a warning if a submission to them needs to be scrutinized with extra care.

The Fifth Circuit's proposed rule on generative AI addressed these same concerns, proposing a requirement that anyone filing a document with the court (lawyer or not) either needed to certify they had not used generative AI to prepare the document or if they had done so, that a "human" had checked to verify the accuracy of the submission.[87] Ultimately, the court decided not to impose the rule,[88] but the concerns it expressed in proposing it help to explain the belt-and-suspenders approach it proposed. It stated that it had decided "not to adopt a special rule regarding the use of artificial intelligence in drafting briefs at this time," but warned:

> 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.[89]

This view that generative AI must be called out specifically is not universal; however, judges do not overwhelmingly see the need to address it with particularized rules. Most judges have not mentioned the use of generative AI in their standing rules at all. That may be because they assume that the obligations of lawyers to be competent and candid obviate the need

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Id.

86. Ironically, it also makes the case for the capacity of generative AI to do judicial work. If all judges are really doing is summarizing, recharacterizing, and choosing the most plausible from arguments submitted to them, generative AI is great at that. Only if they are adding some unique value does it make sense to have humans, rather than AI, deciding cases.

87. Notice of Proposed Amendment, *supra* note 62. The rule is quoted in full *supra* note 63 and is discussed *supra* notes 62–64 and accompanying text.

88. *Court Decision on Proposed Rule*, *supra* note 6.

89. *Id.*

for such disclosure. Judge Arun Subramanian's standing rule follows this approach, noting the "[u]se of ChatGPT or other such tools is not prohibited, but counsel must at all times personally confirm for themselves the accuracy of any research conducted by these means."[90] A local rule for the United States District Court for the Eastern District of Texas is to similar effect, providing:

> If the lawyer, in the exercise of his or her professional legal judgment, believes that the client is best served by the use of technology (e.g., ChatGPT, Google Bard, Bing AI Chat, or generative artificial intelligence services), then the lawyer is cautioned that certain technologies may produce factually or legally inaccurate content and should never replace the lawyer's most important asset–the exercise of independent legal judgment. If a lawyer chooses to employ technology in representing a client, the lawyer continues to be bound by the requirements of Federal Rule of Civil Procedure 11, Local Rule AT-3, and all other applicable standards of practice and must review and verify any computer-generated content to ensure that it complies with all such standards.[91]

State-initiated recommendations regarding the use of generative AI address concerns about the quality of the content it provides and usually treat this as a matter of attorney competence.[92] These typically insist lawyers must understand the technology they are using and avoid using it in ways that might result in the citation of AI-generated and hallucinated legal

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90. Individual Practices in Civil Cases 7, S.D.N.Y., Subramanian, J. (July 29, 2023), https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AS%20Subramanian%20Civil%20Individual%20Practices.pdf [https://perma.cc/SAA5-K5E7]. This rule appears as subparagraph F of Rule 8 of 12 total rules, suggesting that this individual recommendation is simply one of many elements of guidance to best practice before the court.

91. E.D. Tex. R. AT-3(m) (Dec. 2023), https://www.txed.uscourts.gov/sites/default/files/HR_Docs/TXED%20Local%20Rules%2012-23.pdf [https://perma.cc/AQC2-E2K2].

92. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (AM. BAR ASS'N 2025) (noting the duty of competence also requires technological adaptation). *See, e.g.*, D.C. Ethics Op., *supra* note 5 (expressing the view that Chat GPT likely added the fake cases it created in *Mata* to its dataset and this is one way generative AI may exacerbate concerns about hallucinated authority).

> To ChatGPT, the interaction with the *Mata* lawyer was successful and the fake case names may have been added to the dataset to be reported to future users with similar questions. Until the hallucination issue is resolved, systems prone to this problem are therefore self-corrupting, which is yet another reason their outputs need to be checked carefully.

Id. at 7.

sources in court submissions.[93] The possibility of submitting nonexistent caselaw in a litigated matter also leads to concerns about candor to the court and obligations to opposing parties and counsel.[94] The recommendations universally emphasize that using generative AI does not excuse lawyers from their traditional obligations of competence and candor to the court.[95]

B. *The Fear of the "Robot Lawyer"*

The second fear that motivates regulation of generative AI use in legal practice relates to the profound concern felt by some that it will be more than a tool that lawyers use; it will, in effect, take over the function that human lawyers serve.

What worries lawyers about this may be partly driven by concerns about their jobs[96] and what will happen if generative AI can ultimately be relied upon to replace human effort. Those concerns are doubtless present in law, as they are in other fields of endeavor.[97] However, the concerns seem more than simply economic or practical; they reflect profound existential anxieties

93. *See* NYSBA REPORT, *supra* note 4, at 37–38 (explaining how AI can "hallucinate" and create false information); PRACTICAL GUIDANCE, *supra* note 4, at 2–3 (including understanding the risks and limitations of generative AI as part of a lawyer's duty of competence); *see also* D.C. Ethics Op., *supra* note 5 (noting the high percentage chance of AI hallucinations and that researchers emphasize a need for caution).

94. *See* D.C. Ethics Op., *supra* note 5 (discussing obligations under Rules 3.3 and 3.4); NEW JERSEY GUIDELINES, *supra* note 4, at 4–5 (illustrating attorneys' responsibility to be careful given the MRPC's lack of exceptions for the use of AI).

95. *See* NYSBA REPORT, *supra* note 4, at 29, 36–37 (emphasizing the persisting nature of ethical obligations even in light of technological advancement); PRACTICAL GUIDANCE, *supra* note 4, at 4 (emphasizing the duty to review AI-generated documents as part of a lawyer's duty of candor to the tribunal); D.C. Ethics Op., *supra* note 5 (detailing the effects of generative AI on an attorney's duty of candor to the court).

96. *See, e.g.*, Dan Roe, *K&L Gates Joins Orrick in Offering Gen AI Training for Summer Associates*, LAW.COM (June 3, 2024, 2:00 PM), https://www.law.com/americanlawyer/2024/06/03/kl-gates-joins-orrick-in-offering-gen-ai-training-for-summer-associates/ [https://perma.cc/Q63E-ABS5] (stating the firm "has a variety of lawyers who aren't comfortable with the technology or fear it might lead to job reductions").

97. For a source discussing this issue in the context of higher education, see Scott Latham, *Memo to Faculty: AI Is Not Your Friend*, INSIDE HIGHER ED. (June 14, 2024), https://www.insidehighered.com/opinion/views/2024/06/14/memo-faculty-ai-not-your-friend-opinion [https://perma.cc/LVX8-UT6W] (warning "[a]t the end of this decade . . . AI will be solely teaching a notable percentage of courses around the globe").

about technology doing lawyer work.[98] In the view of some, certain types of legal work require human capacities.[99]

That view was shared by one of the individual attorneys who participated when the United States Court of Appeals for the Fifth Circuit promulgated its proposed rule governing the use of generative AI and sought comments.[100] The proposed rule sought to prohibit the use of generative AI outright or, in the alternative, require the signing lawyer to personally verify all sources cited in the submission.[101] One commenting attorney was vocal in arguing for a strict prohibition and plaintive in expressing concerns about the defects inherent in the use of generative AI:

> Whoever developed this policy apparently just doesn't understand that generative AI *cannot think*. Let that sink in and consider the profound, existential ramifications of this undisputed and indisputable fact. Do we really want parties to submit legal work product to courts drafted by a robot that *can't think*? Fifth Circuit judges will use the parties' briefs to decide the best legal resolution and approach to very important matters that have found their way up to the court and to write opinions that not only resolve the dispute between these lazy parties, but that will be binding on everyone in the Fifth Circuit and persuasive authority for the whole world. What they do is very important, consequential, and *hard to do*. They deserve to be given the best possible work product by the parties' legal counsel, not some 'app.'[102]

A number of comments argued that merely expecting a "human" to check the authorities was insufficient and that some specification as to the qualifications of the human should be required.[103] That might require the lawyer signing the document to personally verify all sources cited in the

98. *See* Email from Gary Sasso to Peter J. Winders, Peter Hitson, David W. Bailey, and Steven C. Dupre (Nov. 27, 2023, 9:30 AM), *in* COMMENTS, *supra* note 64 [hereinafter Email from Gary Sasso] (arguing AI lacks human qualities essential to the practice of law).

99. *See id.* (listing types of legal work requiring human capacities).

100. *Id.*

101. Notice of Proposed Amendment, *supra* note 62. The rule is discussed *supra* note 63 and accompanying text.

102. Email from Gary Sasso, *supra* note 98.

103. *Id.* ("This doesn't go far enough. Not even close. This is almost worse than no policy at all. They just don't get it"); *see* Email from Alan Goldstein to Margaret Dufour, Executive Assistant to the Clerk of Court, U.S. Court of Appeals for the Fifth Circuit, and Dean Allen Sutherland (Nov. 28, 2023, 4:52 PM), *in* COMMENTS, *supra* note 64 [hereinafter Email from Alan Goldstein] (suggesting an attorney rather than a human check the authorities).

submission or "an attorney admitted to practice before this court and/or someone working under their direct supervision."[104]

While not all concerns about the human-like potential of generative AI are so personal or emotional, this concern about generative AI replacing human actors is also reflected in a number of proposals with regard to regulating generative AI use by lawyers, which seem premised on the theory that generative AI is essentially the equivalent of a human nonlawyer.[105] This leads to a number of consequences. One is to suggest that generative AI should be subjected to oversight in the same way nonlawyer assistants are; Model Rule 5.3 is routinely cited in support of this proposition.[106] The theory is that these regulations are intended to apply not just to nonlawyer human beings but to services and tools lawyers use.[107] Accordingly, the obligation of a lawyer using generative AI would be to "supervise" it as the

104. *See* Email from Alan Goldstein, *supra* note 103 (internal quotations omitted) (criticizing the rule's lack of specificity in its standard for review which only requires approval "by a human"); *see* also Letter from Lance L. Stevens to Lyle W. Cayce, Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Dec. 2023), *in* COMMENTS, *supra* note 64 ("I do not believe 'by a human' is a strict enough standard."); *see also* Email from Martin Stern to Margaret Dufour, Executive Assistant to the Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Dec. 15, 2023, 7:14 AM), *in* COMMENTS, *supra* note 64 [hereinafter Email from Martin Stern] ("[I]f the Court is to modify the certification, perhaps it would want to require that not only a 'human,' but rather a lawyer, approve and review for accuracy."); *see also* Email from Christopher M. Campbell to Lyle W. Cayce, Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Jan. 4, 2024), *in* COMMENTS, *supra* note 64 [hereinafter Email from Christopher M. Campbell] (recommending the rule "[r]eplace 'human' with 'person making the submission.' [The result is] [m]ore clear and specifically allocates who is responsible/accountable for the proceedings").

105. *See* Fla. Ethics Op., *supra* note 5, at 3 (discussing a prior ethics opinion dealing with disclosure of confidential information to an overseas paralegal and stating "this guidance seems equally applicable to a lawyer's use of generative AI"); *see also id.* at 4 ("While Rule 4-5.3(a) defines a nonlawyer assistant as a 'a person,' many of the standards applicable to nonlawyer assistants provide useful guidance for a lawyer's use of generative AI."); *see also id.* ("Lawyers who rely on generative AI for research, drafting, communication, and client intake risk many of the same perils as those who have relied on inexperienced or overconfident nonlawyer assistants."); *see also id.* at 5 ("Just as with nonlawyer staff, a lawyer should not instruct or encourage a client to rely solely on the 'work product' of generative AI, such as due diligence reports, without the lawyer's own personal review of that work product.").

106. *E.g.* NYSBA REPORT, *supra* note 4, at 30–31 (discussing the duty to supervise "non-human entities, such as artificial intelligence technologies" under Rule 5.3). One of the comments to the Fifth Circuit's proposed rule suggested this concern. *See* Letter from Andrew R. Lee to Lyle W. Cayce, Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Jan. 4, 2024), *in* COMMENTS, *supra* note 64 [hereinafter Letter from Andrew R. Lee] (defining the "Duty of Supervision" owed by lawyers to non-lawyers and categorizing generative AI tools as one of the "non-lawyers" this duty requires lawyers to supervise).

107. *See* Perlman, *supra* note 9, at 352 (noting the change in the title of Model Rule of Professional Conduct 5.3 from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance" to encompass "non-human forms of assistance").

lawyer would supervise a nonlawyer assistant.[108] One judge suggested that one approach to generative AI in doing judicial work is to "consider it analogous to a law clerk."[109]

Another consequence of this notion is that it suggests that AI can engage in what amounts to the unauthorized practice of law.[110] That suggestion would have a number of consequences relevant to attorney regulation. It might mean that unsupervised AI is itself engaging in the unauthorized practice of law.[111] Lawyers assisting the AI in doing so might run afoul of rules prohibiting that conduct.[112]

Interestingly, lawyers seem sufficiently wary of being deemed to have relied on AI that, when accused of doing so, they quickly interpose a claim of human failure. In one case, a lawyer who used ChatGPT to locate what turned out to be fictitious authority claimed, falsely, that a legal intern had made the errors.[113]

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108. NYSBA REPORT, *supra* note 4, at 29–30; *see also* Perlman, *supra* note 9, at 360 (arguing lawyers should assume the same obligation to "provide appropriate oversight and review before filing a document" produced by AI, as they do for work produced by a summer associate).

109. Perhaps the best way to view the appropriate way for a judge to utilize generative AI is to consider it analogous to a law clerk. A law clerk can be very helpful in researching the law and facts in a case, and also in drafting a decision or order, but, in the end, it is duty of the judge to ultimately reach any conclusion on any legal issue in a case.

Hon. W. Kearse McGill, *Ethical Rules to Consider When Using Generative Artificial Intelligence as a Judge*, A.B.A. (Apr. 23, 2024), https://www.americanbar.org/groups/judicial/resources/jd-record/2024/ethical-rules-when-using-generative-artificial-intelligence/ [https://perma.cc/G8BJ-RBWU].

110. *See, e.g.,* NYSBA REPORT, *supra* note 4, at 31–32 (raising concerns about AI committing unauthorized practice of law).

111. This issue arose in *Miller King LLC v. Do Not Pay, Inc.*, 702 F. Supp. 3d 762, 766 (S.D. Ill. 2023). Miller King, a small law firm, sued Do Not Pay, Inc., a company which marketed itself as offering the services of an AI-driven "robot lawyer" to assist customers with various legal problems. *Id.* Miller King argued that Do Not Pay, Inc. was engaging in the unauthorized practice of law. *Id.* at 769. The court found that the plaintiff lacked Article III standing. *Id.* at 774. As a result, the court dismissed the case without addressing the UPL issue. *Id.*

112. *See* Fla. Ethics Op., *supra* note 5, at 4 (noting "a lawyer may not delegate to generative AI any act that could constitute the practice of law such as the negotiation of claims or any other function that requires a lawyer's personal judgment and participation"); *see also id.* at 4–5 (noting a prior ethics opinion, Florida Ethics Opinion 88–6, which outlines the appropriate role of nonlawyers in client intake, is "especially useful as law firms increasingly utilize website chatbots for client intake").

113. *See* People v. Crabill, No. 23PDJ067, 2023 WL 8111898, at *1 (Colo. Nov. 23, 2023). Crabill was asked to draft a motion to set aside a civil judgment in a client's case, a task with which he was unfamiliar. *Id.* He utilized ChatGPT to find authority for the motion and cited and submitted it to the court without verifying its existence. *Id.*

> Before a hearing on the motion, Crabill discovered that the cases from ChatGPT were either incorrect or fictitious. But Crabill did not alert the court to the sham cases at the hearing. Nor did he withdraw the motion. When the judge expressed concerns about the accuracy of the cases,

It is not clear that the rules on nonlawyer assistants will prove particularly relevant or helpful to managing concerns about generative AI. The rule requires a lawyer to understand the "education, experience, and reputation" of the nonlawyer,[114] which doesn't accurately describe the lawyer's obligations with regard to understanding the technology. Considering how the AI tool was trained implicates its "education," but that seems like a nonintuitive way to talk about a digital tool.[115]

Nonetheless, the nature of generative AI routinely drives this kind of description. One author suggests we should approach AI tools like "weird, somewhat alien interns that work infinitely fast and sometimes lie to make you happy[.]"[116] Ironically, the best uses of AI sometimes appear to be teaching people how to act more human.[117] The concern is not ultimately that the tool seems human but that it has the capacity (or will at some point have the capacity) to act autonomously even though it is not human. That might worry some decisionmakers.

Crabill falsely attributed the mistakes to a legal intern. Six days after the hearing Crabill filed an affidavit with the court, explaining that he used ChatGPT when he drafted the motion.

Id. Crabill's license was suspended for a year, with all but ninety days of the suspension stayed upon successful completion of a two-year term of probation. *Id.*

114. *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. 3 (AM. BAR ASS'N 2025) ("A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client . . . . When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer.")

115. *See* Perlman, *supra* note 9, at 352–53 (outlining a lawyer's duty of oversight of various technologies).

116. Ethan Mollick, *On-Boarding Your AI Intern*, ONE USEFUL THING (May 20, 2023), https://www.oneusefulthing.org/p/on-boarding-your-ai-intern [https://perma.cc/XP5M-J85Y].

117. *See, e.g.*, Gina Kolata, *When Doctors Use a Chatbot to Improve Their Bedside Manner*, N.Y. TIMES (June 13, 2023), https://www.nytimes.com/2023/06/12/health/doctors-chatgpt-artificial-intelligence.html [https://perma.cc/Z5WL-XCQA] (discussing how doctors use AI to help them do a better job of communicating with patients). I confess to being a bit skeptical about the results; the script for patients who were having trouble with alcohol abuse began, "If you think you drink too much alcohol, you're not alone. Many people have this problem, but there are medicines that can help you feel better and have a healthier, happier life." *Id.* To me, this has the perky and profoundly annoying lilt of trite advertising copy or an annoying robocall, but opinions differ.

Judge Brantley Starr's comment accompanying his standing rule regarding the use of generative AI reflects worries about the autonomous capacities of the technology:

> While attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath. As such, these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth). Unbound by any sense of duty, honor, or justice, such programs act according to computer code rather than conviction, based on programming rather than principle.[118]

This seems to suggest generative AI is dangerous and needs to be regulated because it lacks some fundamentally human characteristics essential to effective lawyering—a "sense of duty, honor or justice," an inability to disavow "personal prejudices" and "biases," or an absence of "conviction" or "principle" rather than "programming."[119] The answer to that problem, in Judge Starr's view, was either to preclude the use of the tool altogether or to require that a human being verify its work, utilizing their own human sense of "duty, honor, or justice" in the process.[120]

A similar approach, initially taken by Magistrate Judge Gabriel Fuentes, reveals both concerns about "bogus" authority being submitted to the court and about the danger of an autonomous AI actor preparing court submissions.[121] Quoting Hal, the computer that runs amok in the film

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118. Judge Starr Certification, *supra* note 84.

119. *Id.*

120. *Id.*

121. Standing Order for Civil Cases Before Magistrate Judge Gabriel A. Fuentes 2, N.D. Ill., Fuentes, J. (May 31, 2023), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20rev%27d%205-31-23%20(002).pdf [https://perma.cc/9PWC-7QB5].
The pertinent part of Magistrate Judge Fuentes's order is below:

> The Court has adopted a new requirement in the fast-growing and fast-changing area of generative artificial intelligence ("AI") and its use in the practice of law. The requirement is as follows: Any party using any generative AI tool to conduct legal research or to draft documents for filing with the Court must disclose in the filing that AI was used, with the disclosure including the specific AI tool and the manner in which it was used. Further, Rule 11 of the Federal Rules of Civil Procedure continues to apply, and the Court will continue to construe all filings as a certification, by the person signing the filed document and after reasonable inquiry, of the matters set forth in the rule, including but not limited to those in Rule 11(b)(2). Parties should not assume that mere reliance on an AI tool will be presumed to constitute reasonable inquiry, because, to

"2001: A Space Odyssey,"[122] Judge Fuentes's order first required disclosure of the specific use of generative AI, mentioned that Rule 11 would still require "reasonable inquiry," and stated, "Parties should not assume that mere reliance on an AI tool will be presumed to constitute reasonable inquiry, because, to quote a phrase, 'I'm sorry, Dave, I'm afraid I can't do that . . . . This mission is too important for me to allow you to jeopardize it.'"[123] Instead, the order stated, "Just as the Court did before the advent of AI as a tool for legal research and drafting, the Court will continue to presume that the Rule 11 certification is a representation by filers, as living, breathing, thinking human beings."[124] This order was rescinded in 2024.[125]

The profound fear of the autonomous capacity of generative AI technology invokes the need not just to protect the court but to assure the primacy of human actors in doing legal work.[126]

C. *Fear of Missing Out: Embracing the Capacity of New Technology*

People who are profoundly optimistic about the transformative power of generative AI in the practice of law have distinct views with regard to

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> quote a phrase, "I'm sorry, Dave, I'm afraid I can't do that . . . . This mission is too important for me to allow you to jeopardize it." 2001: A SPACE ODYSSEY (Metro-Goldwyn-Mayer 1968). One way to jeopardize the mission of federal courts is to use an AI tool to generate legal research that includes "bogus judicial decisions" cited for substantive propositions of law. Just as the Court did before the advent of AI as a tool for legal research and drafting, the Court will continue to presume that the Rule 11 certification is a representation by filers, as living, breathing, thinking human beings, that they themselves have read and analyzed all cited authorities to ensure that such authorities actually exist and that the filings comply with Rule 11(b)(2).

Id. (internal citations omitted).

122. *Id.*

123. *Id.* The popular culture reference is a little puzzling; the rule quotes the language of the rogue computer while making an argument in support of the need for humans to control AI and for the primacy of human effort.

124. *Id.*

125. *See* Standing Order for Civil Cases Before Magistrate Judge Gabriel A. Fuentes 13, N.D. Ill., Fuentes, J. (Dec. 20, 2024), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20revision%2012-20-24%20GAF.pdf [https://perma.cc/6Y6B-KKXU] ("The Court has gravitated toward a more collaborative approach in which attorneys have been requested, and not required, to disclose their use of generative AI in their legal research and brief drafting); s*ee also Tracking Federal Judge Orders On Artificial Intelligence*, LAW360, https://www.law360.com/pulse/ai-tracker [https://perma.cc/2TBL-FYUT] (following federal court orders on the use of AI).

126. *See* NYSBA REPORT, *supra* note 4, at 59 ("While the Tools are not a 'person,' you should refrain from relying exclusively on them or the output derived from them when providing legal advice and maintain your independent judgment on a matter.").

regulating its use. Some commentators are content to argue that rules should be "technology-neutral," applying the usual expectations for lawyer conduct without singling out the use of AI for special scrutiny.[127]

But others go further, arguing that special rules for users of generative AI are inadvisable precisely because they will discourage or stigmatize the use of what ought to be embraced as a door-opening technology that will improve access to justice.[128] In critiquing the Fifth Circuit's proposed rule, one lawyer argued that it "imposes unnecessary burdens on lawyers by requiring them to track and disclose generative AI usage, regardless of its extent or impact. This creates a chilling effect on the responsible adoption of AI tools, hindering lawyers' ability to leverage technology to improve efficiency and access to justice."[129]

The desire to advance the technology because of its perceived benefits affects the speakers' views about regulation.[130] One commenter contended requiring disclosure of generative AI use, regardless of the purpose, might

127. *See* Grossman et al., *supra* note 14, at 71 (taking the position that the "[r]ules of civil procedure should be technology-neutral"). This was suggested by one commenter in response to the proposed Fifth Circuit rule on the use of AI. Email from Hon. Xavier Rodriguez, United States District Judge, Western District of Texas to Margaret Dufour, Executive Assistant to the Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Nov. 28, 2023, 5:15 PM), *in* COMMENTS, *supra* note 64 (stating the rule should only require "counsel and unrepresented filers must further certify that all citations and legal analysis has been reviewed for accuracy" without any specific reference to the use of AI). *See also* Letter from Carolyn Elefant to Lyle W. Cayce, Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Jan. 1, 2024), *in* COMMENTS, *supra* note 64 [hereinafter Letter from Carolyn Elefant] ("Singling out only generative AI products for verification creates a double standard and impractical burdens for attorneys . . . .").

128. Email from Shelby L. Shanks to Margaret Dufour, Executive Assistant to the Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Jan. 2, 2024, 3:27 PM), *in* COMMENTS, *supra* note 64 [hereinafter Email from Shelby L. Shanks] ("The proposed rule . . . hinder[s] lawyers' ability to leverage technology to improve efficiency and access to justice.").

129. *Id.*; *accord* Email from Layne E. Kruse and Warren S. Huang to Lyle W. Cayce, Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Jan. 4, 2023), *in* COMMENTS, *supra* note 64 [hereinafter Email from Kruse and Huang] ("These uncertainties, in turn, deter the use of cutting-edge technologies in the legal profession. Some attorneys might believe that checking the box in Form 6 that generative Al was used will be perceived negatively by some judges and law clerks. And so, to avoid triggering the reporting requirement, attorneys may steer clear of technologies that arguably use generative Al. Because many research tools have incorporated some form of generative Al component (or will likely do so in the near future), the proposed rule might deter attorneys from using tools that could benefit not just their clients but also this Court.").

130. Email from Shelby L. Shanks, *supra* note 128 (opposing the rule on the grounds of supporting future technological advancements).

discourage beneficial uses of the technology.[131] It argued those benefits would help the courts as well as lawyers.[132] While a lawyer who simply asked generative AI to write a brief for them could be delegating too much to the technology, a lawyer who sought to use generative AI for suggestions to improve a brief already drafted by a lawyer would be doing something useful that would benefit the court.[133] That lawyer might be discouraged from using the technology if it had to be disclosed or might be tempted to violate the rule and keep the use of generative AI private.[134] The commenter suggested this concern could be addressed by requiring verification of the content of a document but not disclosure that generative AI had been used to prepare it.[135] Another contended the rule would stigmatize the use of one category of tool that has the potential to be of tremendous utility in the practice of law.[136]

At its extreme, some of these proponents of generative AI argue that, since AI is likely at some point to do some work more accurately, efficiently, and inexpensively than human lawyers will, it will become a breach of competency *not* to use it.[137] Concerns about lawyer competence are asserted on both sides of the regulatory divide.

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131. Email from Paul Sherman to Lyle W. Cayce, Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Jan. 3, 2024), *in* COMMENTS, *supra* note 64 (specifically noting AI's potential future of "improving the quality of legal writing").

132. *Id.* ("[T]he proposed rule, if adopted by this Court, will discourage uses of generative AI that could benefit this Court and the public . . . .").

133. *Id.* (drawing a distinction between using AI to draft and using AI to edit).

134. *Id.* (criticizing the rule for presenting a difficult choice but failing to address the Court's primary concerns).

135. *See id.* (commenting on behalf of the Institute for Justice, a firm with ample experience in the Fifth Circuit, and contending complete bans on AI are unnecessary given the requirement that filers must disclose the use of AI and verify that the work "has been reviewed for accuracy and approved by a human").

136. *See* Letter from Andrew R. Lee, *supra* note 106 ("The proposal unfairly stigmatizes the use of generative AI and, by extension, the legal practitioners who employ it. The requirement to certify whether a 'generative AI program' was 'used' introduces an unwarranted bias against such technology and those who choose to use it. By singling out generative AI, the rule suggests that its use is somehow less trustworthy than other technological or traditional means of legal research and document preparation. The resulting stigma simultaneously undermines the credibility of practitioners who leverage AI to enhance their work and discourages innovation and the adoption of new technologies in the legal field.").

137. NYSBA REPORT, *supra* note 4, at 29 ("A refusal to use technology that makes legal work more accurate and efficient may be considered a refusal to provide competent legal representation to clients." (quoting Nicole Yamane, *Artificial Intelligence in the Legal Field, and the Indispensable Human Element Legal Ethics Demands*, GEO. J. LEGAL ETHICS (2020), https://www.law.georgetown.edu/legal-ethics-

These commentators may understate concerns about current versions of the technology or be confident that they can be easily addressed. The reality may not be quite so simple,[138] and some are more skeptical about the likely value the technology will bring.[139] But skepticism about new technologies is hardly novel, and the capacity and accuracy of the tools are likely to grow with time.[140] As the tools get better and lawyers' ability to master them expands, generative AI will doubtless become an essential tool of competent law practice.

There is another way to understand this concern about limiting, constraining, and stigmatizing the use of generative AI, and it relates to the potential of the technology to equalize differences in access to resources across the profession.[141] The claim is that generative AI cannot take the place of the privilege of human assistance: law firms with large staffs, judges with law clerks, and other better-resourced organizations that do legal work.[142] Lawyers advocating for the value of generative AI may view the tool as an equalizer, providing them some level of support in editing, drafting, and research that other, more privileged providers have the benefit

journal/wp-content/uploads/sites/24/2020/09/GT-GJLE200038.pdf [https://perma.cc/DQD4-LJPE])).

138. *See* Perlman, *supra* note 9, at 348 (stating "lawyers can satisfy their duty of confidentiality when using third-party generative AI tools by making reasonable efforts to ensure that the third parties do not access the prompts or train their models from those prompts" and suggesting that if that is done, "the use of generative AI would be analogous to a lawyer's use of Microsoft OneDrive or a query on Westlaw or Lexis"). Concerns about the confidentiality of information utilized in prompts to generative AI arose when law firms learned a Microsoft tool they were using contained a provision in the fine print that authorized Microsoft employees to manually review certain prompts. That could result in the disclosure of confidential information. A number of law firms were not aware of the review provision and had not negotiated for an exemption. *See* Cassandre Coyer & Isha Marathe, *Legal Industry Players Missed a Microsoft AI Loophole That Could Expose Confidential Data*, LAWTECH NEWS (Mar. 20, 2024), https://www.law.com/legaltechnews/2024/03/20/legal-industry-players-missed-a-microsoft-ai-loophole-that-could-expose-confidential-data/ [https://perma.cc/M793-ABEP] (discussing the data loophole).

139. *See* NYSBA REPORT, *supra* note 4, at 41 ("Where generative AI may make it easier for those without a lawyer to find an answer to a legal issue, it may make it harder for them to find the correct answer.").

140. *See* Email from Shelby L. Shanks, *supra* note 128 (raising the possibility of future technological advancements).

141. *See* Letter from Carolyn Elefant, *supra* note 127 (highlighting the problem of inaccessibility of caselaw).

142. *Cf.* NYSBA REPORT, *supra* note 4, at 41–42 (describing the potential impact of AI on under-resourced pro bono organizations).

of sourcing from human beings.[143] Ironically, the cost of generative AI has raised concerns that its availability will actually end up "widening the gap between litigants who have money to spend on technology and those who do not."[144] The best evidence of this very intentional, personal commitment to the use of generative AI was perhaps the fact that multiple lawyers submitting comments to the Fifth Circuit on its proposed rule indicated they had used generative AI to prepare the first draft of their comments.[145]

These assessors of the appropriate way to regulate the use of generative AI in the practice of law are convinced the tool will, or at least has the substantial potential to, improve the quality of lawyers' output, perform work that addresses unmet legal needs, and help solve the access to justice problem. These optimistic prognoses are not universally shared,[146] but the viewpoint does tend to drive one's view of the regulatory enterprise. If you believe generative AI will solve the world's problems, you may be hesitant to put roadblocks in its way.

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143. *See, e.g.*, *id.* at 42–43 (discussing pro bono attorneys using AI for assistance with their legal research).

144. Marco Poggio, *AI Legal Tools Could Be Too Pricey For Those Most in Need*, LAW360 (May 3, 2024, 7:03 PM), https://www.law360.com/pulse/articles/1831544/ai-legal-tools-could-be-too-pricey-for-those-most-in-need [https://perma.cc/57PV-RZRE]. *But cf.* Sarah Martinson, *How Courts Can Use Generative AI to Help Pro Se Litigants*, LAW360 (May 3, 2024, 7:03 PM), https://www.law360.com/articles/1833092/how-courts-can-use-generative-ai-to-help-pro-se-litigants [https://perma.cc/S7S2-6HUP] (noting value of chatbots and automated document software and discussing the potential of generative AI to enhance these services).

145. *See* Email from Joshua Cottle to Margaret Dufour, Executive Assistant to the Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Nov. 30, 2023, 10:49 PM), *in* COMMENTS, *supra* note 64 (adding he had used ChatGPT to prepare the first version of his argument); *see also* Letter from Carolyn Elefant, *supra* note 127 (describing her use of Casetext's search feature to locate cases).

146. *See* Michael T. Hicks et al., *ChatGPT is Bullshit*, ETHICS AND INFO. TECH., June 8, 2024, at 38, 37–38 (arguing for the characterization of hallucinated information in AI-generated legal argument as "bullshit"). Regardless of how it is described, research shows generative AI is not yet a reliable tool to use in producing written legal work with a research component. Even retrieval augmented generation tools, which align a generative AI tool with an existing legal database, continue to be problematic even when they are designed specifically for legal users. *See* Varun Magesh et al., *Hallucination-Free? Assessing the Reliability of Leading AI Legal Research Tools*, J. EMPIRICAL LEGAL STUD., 3 (forthcoming 2025) ("LexisNexis's Lexis+ AI is the highest-performing system we test, answering 65% of our queries accurately. Westlaw's AI-Assisted Research is accurate 42% of the time, but hallucinates nearly twice as often as the other legal tools we test. And Thomson Reuters's Ask Practical Law AI provides incomplete answers . . . on more than 60% of our queries . . . ."). The authors of the article painstakingly asked standard queries, then assessed the outputs "by hand" by comparing the responses with what legal research actually showed. *Id.* at 13. While the AI rarely invented authority wholesale, it regularly mischaracterized holdings, failed to properly analyze cases, and was unable to recognize whether a cited authority was good law in the relevant jurisdiction. *Id.* at 14.

That being said, creative uses of generative AI may be frowned upon when they add little to the analysis of a legal issue.[147] In one case, lawyers seeking attorney's fees in a successful IDEA case offered ChatGPT-4's conclusions about the propriety of their fees as support for their fee request.[148] The court was unconvinced, stating:

> [The law firm's] invocation of ChatGPT as support for its aggressive fee bid is utterly and unusually unpersuasive. As the firm should have appreciated, treating ChatGPT's conclusions as a useful gauge of the reasonable billing rate for the work of a lawyer with a particular background carrying out a bespoke assignment for a client in a niche practice area was misbegotten at the jump.[149]

D. *Business as Usual*

The fears that manifest in the rules of individual judges and comments of individual lawyers significantly dampen down in collective assessments of the state of affairs with regard to generative AI. States that have mobilized more traditional vehicles to comment on the issues surrounding the use of generative AI in the practice of law tend to suggest that, for the most part, the existing regime of lawyer regulation can deal adequately with the concerns the technology presents.[150]

Many agree that existing rules, properly applied, will adequately address concerns about the use and misuse of generative AI.[151] Wrote one lawyer in response to the proposed Fifth Circuit rule:

> The existing rules, and duties of counsel are already very clear. Existing rules set out the duty to competently prepare a brief and to know what is in it, and to ensure it is accurate as a matter of fact and law. 'AI' may get media attention, but as pertains to its use in a brief–ie, something that a lazy lawyer

147. *See* Email from Gary Sasso, *supra* note 98 (comparing AI to "autocorrect" and characterizing it as defective and useless).

148. J.G. v. N.Y.C. Dep't of Educ., 719 F. Supp. 3d 293, 307–308 (S.D.N.Y. 2024).

149. *Id.* at 307–308. The court rejected any reliance on ChatGPT with regard to the propriety of the fee request and warned counsel against trying to do so again. *Id.* at 308. "The Court therefore rejects out of hand ChatGPT's conclusions as to the appropriate billing rates here. Barring a paradigm shift in the reliability of this tool, the Cuddy Law Firm is well advised to excise references to ChatGPT from future fee applications." *Id.*

150. As the NYSBA Report indicated, "[m]any of the risks posed by AI are more sophisticated versions of problems that already exist and are already addressed by court rules, professional conduct rules and other law and regulations." NYSBA REPORT, *supra* note 4, at 53.

151. *See, e.g.,* Letter from Andrew R. Lee, *supra* note 106 (arguing the existing rules are adequate).

> may copy and paste into a brief without thinking about it–it is nothing new, and there is no need for a special rule for it.[152]

As one of the attorneys submitting comments suggested, the reaction of many of these actors was "anecdotal" rather than data-driven,[153] and unnecessary. For the most part, guidance analyzing the issue of generative AI use indicates existing rules can adequately address any concerns.[154]

Most state assessments start with the issue of competence, and indicate that, at least for the moment, existing rules adequately cabin attorney conduct.[155] Any lawyer seeking to use the technology will have an obligation

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152. *See* Email from Brian King to Margaret Dufour, Executive Assistant to the Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Nov. 29, 2023, 9:21 AM), *in* COMMENTS, *supra* note 64 (expressing the view that AI-specific rules were "bound to become relics", concluding that "'AI-focused court rules', like Cabbage Patch Kids, pet rocks, and fidget spinners, are a passing fad that may bring us some amusement but add nothing to substance"); *accord* Email from Martin Stern, *supra* note 104 ("Personally, I'm not sure an amendment is necessary as a lawyer already has to sign and vouch for everything in the brief."); *see also* Email from David S. Coale to Lyle W. Cayce, Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Jan. 3, 2024), *in* COMMENTS, *supra* note 64 [hereinafter Email from David S. Coale] ("Of course, generative AI has an alarming tendency to 'hallucinate' (or, in other words, make stuff up). But precisely because citation to 'fake law' is such a serious matter, court rules and state ethical standards already prohibit it."); *see also* Letter from Thomas C. Wright to Lyle W. Cayce, Clerk of the Court, U.S. Court of Appeals for the Fifth Circuit (Jan. 3, 2024), *in* COMMENTS, *supra* note 64 [hereinafter Letter from Thomas C. Wright] ("The Court should already have the power under Rule 38 to impose sanctions for misstatements of law in a brief."); *see also* Email from Kruse and Huang, *supra* note 129 ("[W]e agree with the proposed rule's underlying premise that attorneys bear the responsibility to review and verify the accuracy of their legal and factual assertions. But this responsibility is already codified in Rule 11 of the Federal Rules of Civil Procedure, which applies to filings in the district court, and Rule 32(d) of the Federal Rules of Appellate Procedure, which applies to filings on appeal."); *see also* Letter from Andrew R. Lee, *supra* note 106 ("There is no law of churns, just as there is no law of generative AI. But the existing Rules of Professional Conduct are adequate to the task of corralling lawyers' conduct in the era of generative AI and should be allowed to function as intended. Rather than proposing new restrictions, we should continue to apply the established professional conduct standards to emerging technologies like AI. The rules are resilient and flexible; they provide a framework adaptable to innovation while upholding lawyers' core duties. They can handle this next evolution in legal practice.").

153. Letter from Andrew R. Lee*, supra* note 106 ("[T]hese examples are anecdotes. They do not rise to the level of 'data.' Only data—and not anecdotes—should drive a rule change that affects such an important court as the Fifth Circuit." (footnote omitted)); *see also* Letter from Carolyn Elefant, *supra* note 127 ("Although widely publicized incidents involving lawyers misusing generative AI highlight the longstanding problem of inaccurate case citations, the dirty little secret is that these infractions have always existed and gone undetected. The advent of generative AI exposed, but did not cause the problem of inaccurate citations in court filings long known to experienced practitioners.").

154. ABA Formal Ethics Op. 512 (2024) takes this approach.

155. *See, e.g.*, Fla. Ethics Op., *supra* note 5, at 3 (applying existing ethics rules and opinions to AI use).

to understand its capacity and limits and to use it correctly.[156] Concerns about relying on nonexistent authority are addressed through existing rules regarding competent representation and the obligation of candor to the court.[157]

Many have also noted the use of generative AI raises concerns about confidentiality.[158] Generative AI can retain and reuse prompts submitted to it, leading to the possibility that confidential client information contained in prompts submitted by lawyers would effectively disclose protected client information to third parties.[159] State guidance advises lawyers to aggressively protect their client's confidential information, to be informed about how their AI tool of choice uses confidential information, and to avoid tools that might expose protected information.[160]

Questions arise about communication with clients and whether clients need to be informed about and consent to the use of generative AI on their matters.[161] One author argues that while using generative AI might be analogous to using legal research databases or auto-correct in Microsoft Word, since clients may have concerns about its use, it would be advisable

156. *See* MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (AM. BAR ASS'N 2025) ("[A] lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology . . . .").

157. *See* PRACTICAL GUIDANCE, *supra* note 4, at 2–5 (listing rules which apply regardless of AI use); NEW JERSEY GUIDELINES, *supra* note 4, at 3 ("The core ethical responsibilities of lawyers, as outlined in the Rules of Professional Conduct (RPCs) are unchanged by the integration of AI in legal practice . . . ."); NYSBA REPORT, *supra* note 4, at 53 (recommending lawyers learn "to understand the technology so that they may apply existing law to regulate it").

158. *See, e.g.,* PRACTICAL GUIDANCE, *supra* note 4, at 2 (discussing concerns about confidentiality in the context of AI use).

159. *Id.* ("Generative AI products are able to utilize the information that is input . . . to train the AI, and might also share the query with third parties or use it for other purposes. Even if the product does not utilize or share inputted information, it may lack reasonable or adequate security.").

160. *See* NYSBA REPORT, *supra* note 4, at 30 (discussing a lawyer's duty of confidentiality). This was also a concern of a standing order issued by Judge Stephen Vaden, a judge on the U.S. Court of International Trade. Order on Artificial Intelligence 1, Ct. Int'l Trade, Vaden, J. (June 8, 2023), https://www.cit.uscourts.gov/sites/cit/files/Order%20on%20Artificial%20Intelligence.pdf [https://perma.cc/7B8M-2NW5]. Judge Vaden's order, requiring disclosure of the use of generative AI, focused on concerns about confidentiality. *Id.* at 1–2. His order accordingly requires both a disclosure notice about the specific generative AI product that was used and a "certification that the use of such program has not resulted in the disclosure of any confidential or business proprietary information to any unauthorized party." *Id.* at 2–3.

161. *See* PRACTICAL GUIDANCE, *supra* note 4, at 4 (suggesting lawyers should inform their clients if they are using AI in the representation); Fla. Ethics Op., *supra* note 5, at 2 (recommending obtaining a client's informed consent before using generative AI).

to consult with clients about using generative AI[162] even though the typical lawyer would not consult explicitly about the use of any of these other tools.[163]

Some discuss the impact of the use of generative AI on fees and expenses, raising both the concern that clients should be informed if they are paying for the expense of a generative AI tool and that any saving of time realized by lawyers using generative AI tools should be reflected in their hourly billings.[164] One discusses what a complete client file will look like when generative AI has been used in the client's matter, and suggests that prompts and material generated by the AI tool should be included and preserved.[165] And issues arise about supervision of nonlawyer assistants. Most of the time, the concern is that subordinates using the technology—whether lawyers or nonlawyers—need to be properly trained and supervised to ensure that their conduct conforms to the rules of professional responsibility.[166]

V. USING THIS ANALYSIS TO ASSESS REGULATORY PROPOSALS

Recognizing the three sets of concerns that motivate reactions to generative AI in the practice does not provide any sort of encyclopedic blueprint for regulators. But it helps us understand what a more sustainable, acceptable, and responsive regulatory regime would look like.

The concerns of judges that generative AI may result in erroneous judgments and the consequent loss of respect for the judicial enterprise are legitimate. At the same time, responding by imposing a complete prohibition on the use of generative AI seems unlikely to be a successful response. It is not practical, it is not helpful, and it is probably more meddlesome than is good for us.

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162. *See* Perlman, *supra* note 9, at 350–51 (arguing the use of generative AI might be a "means to be used" to accomplish the client's objectives and therefore would require consultation under Model Rule of Professional Conduct 1.4(a)(2)).

163. *Id.* at 351 ("[A]t least for now, lawyers are well-advised to consult with clients before using generative AI to assist with anything other than the *de minimis* case of autocompleting simple text.").

164. *See* D.C. Ethics Op., *supra* note 5 (discussing both the need to disclose to clients the charge for use of AI and the requirement that hourly fees accurately reflect lawyer time when GAI is used).

165. *See id.* (prompting lawyers to consider whether interactions with generative AI should be preserved as part of the client file).

166. *Id.* ("Where it is foreseeable that lawyers or nonlawyers . . . will be using GAI in connection with a client representation, the firm and the retaining lawyers should take appropriate steps to ensure that any use of GAI is consistent with the Rules of Professional Conduct."); *see also* NEW JERSEY GUIDELINES, *supra* note 4, at 6 (extending a lawyer's duty to supervise staff to the use of AI).

First, generative AI is so embedded in tools lawyers already use that it is possible lawyers may be using it without intending to and without knowing that they are doing so. It seems unwise to sanction lawyers for inadvertently using a prohibited tool when they are simply utilizing widely-adopted tools for document preparation. It might be difficult for lawyers both to know when the tool they are using applied generative AI and when they, in fact, had "used" it.[167]

Second, it is very hard to tell after the fact when generative AI has been used to prepare a document.[168] Allegations that lawyers violated rules by using generative AI without disclosure will likely be hard to prove and lead to time-consuming and inconclusive collateral proceedings.

Those proceedings, more significantly, would delve into the details of how lawyers do their work. That would make this a rare situation in which judges are empowered to tell lawyers not just what work they must do but the manner in which they must do it.[169] Some have suggested that requiring lawyers to disclose their methodology would be an intrusion on attorney work product and might provide an unfair advantage to opposing counsel.[170]

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167. *See* Email from David S. Coale, *supra* note 152 (discussing difficulties in detecting the use of generative AI); *see also* Email from Christopher M. Campbell, *supra* note 104 (providing a hypothetical example of inadvertent AI use).

168. *See, e.g.,* Letter from Carolyn Elefant, *supra* note 127 ("I do not know and could not figure out whether AI is also a part of the search features.").

169. For comments on a standing order that offered to provide an opportunity for oral argument on a motion if a junior lawyer was going to argue it, see Eugene Volokh, *Judges Encouraging Oral Argument Opportunities for Junior Lawyers*, THE VOLOKH CONSPIRACY (May 2, 2024, 12:47 PM), https://reason.com/volokh/2024/05/02/judges-encouraging-oral-argument-opportunities-for-junior-lawyers/?comments=true#comments [https://perma.cc/3LMZ-BPBS]. The comments generally suggested that the judge's intervention inappropriately pressured the law firm to seek oral argument for which the client would have to pay.

170. *See* Letter from Thomas C. Wright, *supra* note 152 ("Moreover, requiring a lawyer to disclose to the opposition whether they have used AI in drafting a brief is a serious invasion of the work-product privilege. What processes a lawyer uses to write a brief should be protected by that privilege. For example, if after drafting a brief an attorney asks an artificial-intelligence program to write the opposing brief so that the attorney can make sure he or she is addressing all of the key issues, the attorney will have to disclose that process—and the opposing party gains an advantage by that knowledge."); *see also* Letter from Carolyn Elefant, *supra* note 127 ("A lawyers' chosen research tools probably do not qualify as work-product privilege. Nevertheless, the combination of research tools that I use for my briefs and filings are a proprietary matter between my clients and me, and not a topic I feel comfortable broadcasting in a public court disclosure. That said, requiring disclosure of use of AI is potentially a slippery-slope towards undermining attorney-client work product. If courts can require disclosure of use of AI tools, will compelled disclosure of prompts and search strategy –

Generative AI seems to make us more inclined to be prescriptive than usual, but it is not clear whether there is a justification for that level of judicial invasion into the methodology of the lawyers appearing before them.[171] The underlying concern, which is assuring the quality of the work submitted to the court, can be addressed elsewhere.

Whether judges should be put on notice that the work involved the use of generative AI so that they exercise more diligence to assure the bona fides of the law submitted to them is an interesting question. One can imagine a sort of "safe harbor" rule that would permit lawyers to make appropriate use of generative AI technology as long as they assure the court that they have verified the content of their submission. And the reassurance of knowing which submissions were prepared with the use of generative AI might calm judicial concerns about being misled.

At the same time, such a rule may accomplish less than judges would hope. Bad lawyers submit bad authority all the time; it is not clear why the generative-AI-assisted lawyer should be subject to a higher level of scrutiny. And lawyers sometimes fail to follow standing orders. So, judges may rely on attorney certifications at their peril. Perhaps what the judiciary needs is some technological tools of their own to quickly assure themselves of the legitimacy of authority cited to them, which would suggest the right answer here may be more technological innovation rather than less.

VI. THE NEXT FRONTIER: USING GENERATIVE AI IN JUDGING

The conversation about the value of using generative AI to do legal work is accompanied by a similar conversation about the wisdom of judicial use of AI technology. Some enthusiastic supporters think generative AI will do a better job judging than humans do.[172]

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activities which indisputably fall within work product privilege – soon follow? Imposing such disclosure requirements risks chilling attorneys' beneficial use of AI powered research tools.").

171. Several of the comments to the proposed Fifth Circuit rule, which required that a "human" verify all cited authority, suggested that merely requiring a "human" to verify them was insufficient—the rule should specify which lawyer must do it. *See* COMMENTS, *supra* note 64 (discussing some issues lawyers have with the proposed rule changes). That seems a deviation from common practice. Lawyers in law firms routinely delegate work to others—whether lawyers, paralegals, or case managers. As long as those individuals are properly supervised, it is ordinarily permissible, as well as cost-effective for clients, to do so. That information is not, in the ordinary course, disclosed to anyone.

172. *See* Snell v. United Specialty Ins. Co., 102 F.4th 1208, 1226–30 (11th Cir. 2024) (Newsom, J., concurring) (discussing the benefits of AI in ordinary-meaning analysis); *see also* Adam Unikowsky, *In AI We Trust,* ADAM'S LEGAL NEWSL. (June 8, 2024), https://adamunikowsky.substack.com/p/in-ai-we-trust [https://perma.cc/7BKA-DRFH] (arguing for extensive use of generative AI

As in the context of practice, the conversation was triggered by a high-profile example, *Snell v. United Specialty Ins. Co.*[173]

Snell, a landscaper, installed a trampoline in a client's backyard; he was sued when someone was injured on the trampoline.[174] His insurer refused to defend him, arguing the claim was not covered by the policy.[175] One issue in the case—though not, as it turned out, the dispositive one—was whether a policy term, which covered "landscaping," covered trampoline installation.[176] In a concurrence, Judge Newsom suggested that large language AI models could be helpful to courts in determining the "everyday" meaning of terms and reported how he had used them to consider the definition of "landscaping."[177] Although this turned out not to be essential to the disposition of the case,[178] it nonetheless triggered a conversation about the propriety of judges using large language models to interpret the ordinary understanding of contract terms.[179]

As it turns out, whether you think this is a good idea turns on what you think about judges and how they do their work. Commentators who express enthusiasm for the prospect of using generative AI to perform judicial work think it will do a better job at the boring task of reviewing and paraphrasing content than actual humans will. Others think that something essentially human will be lost if we mechanize the act of judging. Either way, these

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in judging and for its advantages relative to traditional judging, including speed, the ability to instruct it to exclude particular facts or issues, and its ability to analyze text and write boringly but competently).

173. Snell v. United Specialty Ins. Co., 102 F.4th 1208 (11th Cir. 2024).

174. *Id.* at 1212.

175. *Id.*

176. *Id.* at 1216.

177. *Id.* at 1226–27 (Newsom, J., concurring).

178. Alabama has a somewhat idiosyncratic rule that the insurance application becomes part of the insurance policy. Because in his application for insurance Snell had expressly denied that his work included "any recreational or playground equipment construction or erection" the court concluded it was clear that the policy was not intended to cover (and Snell did not pay a premium to cover) any installation of play equipment. *Id.* at 1214 (majority opinion). That permitted resolution of the matter without the need to consider the ordinary meaning of the term "landscaping." *Id.* at 1213.

179. *See* David Zaslowsky, *Circuit Judge Writes An Opinion, AI Helps: What Now?*, CONNECT ON TECH (June 6, 2024), https://www.connectontech.com/circuit-judge-writes-an-opinion-ai-helps-what-now/ [https://perma.cc/YHG9-S46S] (explaining an instance where AI was sued and the judicial conversation around its usage); *see also* Kevin J. Quilty, *11th Circuit Concurrence Makes 'Modest Proposal' for Use of AI-Powered Large Language Models in Legal Interpretation*, NAT'L L. REV. (June 26, 2024), https://natlawreview.com/article/11th-circuit-concurrence-makes-modest-proposal-use-ai-powered-large-language-models [https://perma.cc/CBP5-KLUY] (characterizing Judge Newsom's concurrence as a thoughtful addition to caselaw concerning AI).

reactions once again tell us more about the speaker than they do about generative AI.

VII. FINAL THOUGHTS

Bringing new technology into the practice of law inspires heated reactions. Lawyers, commentators, judges, and regulators react to the use of generative AI with strong views about its benefits and limits. It is probably too early in the development of this technology and its regulation to know whose views will prevail. It is valuable to understand the fears that motivate those reactions, which will help regulators respond appropriately to stakeholder concerns.

This is not the first time we have had to consider the implications for legal ethics and regulation of the profession of changing technology. Consider the transition from legal research involving largely print sources to the use of legal databases like Lexis and Westlaw.[180] Some lawyers insisted early on that the use of print sources was either superior to the use of online sources or, at the very least, equivalent to it and that it was possible to perform competently and ethically as a lawyer even without access to commercial legal databases.[181] Needless to say, ideas about that issue evolved over time. It seems likely that views of the ethical use of generative AI in legal practice will as well.

We saw something very similar, though in a much narrower context, with regard to metadata. Across the United States, disciplinary authorities and drafters of legal ethics opinions had to contend with what the rules should be when one attorney left metadata in a document and opposing counsel harvested it.[182] Some jurisdictions concluded the harvesting of metadata was simply due to the lawyer's superior skills and more sophisticated use of

180. *See* Barbara Folensbee-Moore, *Features – Ethical Concerns in Doing Legal Research*, LLRX (July 22, 1997), https://www.llrx.com/1997/07/features-ethical-concerns-in-doing-legal-research/ [https://perma.cc/W9P6-FBWW] (discussing how the competency requirement may require a lawyer to use electronic research resources).

181. *Id.* One comment on the piece expressed skepticism about the need for lawyers to have access to the Internet to do competent work: "Although I continue to remain excited about the Internet and the resources it has to offer to the profession and the public, I remain wary of suggestions that access to the Internet or computer research is a pre-requisite for attorneys to remain competent and fulf[i]ll their ethical obligations." Peter Krakaur, Comment to *Features – Ethical Concerns in Doing Legal Research*, LLRX (July 24, 1997, 1:51 PM) (posted to net-lawyers@peach.ease.lsoft.com).

182. *See generally* Fla. Ethics Op., *supra* note 5, at 3 ("In the event that the recipient inadvertently receives metadata information, the recipient must 'promptly notify the sender,' as is required by Rule 4-4.4(b).")

technology, and was unobjectionable.[183] Lawyers who did not want their opponents seeing and using their metadata had an obligation to learn how to scrub their documents. There was nothing wrong with using superior technology skills to gain an advantage over your adversary. Other jurisdictions viewed this in precisely the opposite way.[184] Using information that your opponent inadvertently disclosed to you was not simply an exploitation of superior skill levels. It was cheating. It was unprofessional. And therefore, it was prohibited.

This all seems a bit quaint now. Lawyers are more sophisticated about technology than they used to be, but generative AI is still unfamiliar, and traditional fears and anxieties are on display. We will all calm down in time. Even if we still have much to learn about the technology, for now, we are learning much more about ourselves.

183. *See, e.g.,* Colo. State Bar Ass'n Comm'n on Ethics, Ethics Op. 119, at 4-431 (2008) (concluding "a Receiving Lawyer generally may search for and review any metadata included in an electronic document or file").

184. *E.g.,* Fla. Ethics Op., *supra* note 5, at 3 (explaining Florida's requirement that the recipient of unintended metadata must "promptly notify the sender").