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## AI in Robes: Courts, Judges, and Artificial Intelligence

GARY E. MARCHANT\*

The legal system, courts, and judges in particular, are often criticized for being slow to address new technologies.<sup>1</sup> That has not been the case with artificial intelligence (“AI”), especially since the public release of generative AI programs such as ChatGPT.<sup>2</sup> In the last couple of years, the court systems and individual courts have proactively taken steps to anticipate and prepare to deal with issues created by AI.<sup>3</sup> These actions include both steps to allow courts to take advantage of the benefits offered by AI, and to be prepared to identify and mitigate the risks created by AI.<sup>4</sup> This rare technological activism by the courts reflects an understanding of the profound impacts that AI is likely to have on the legal system and society.

This Article reviews the actions that courts have taken to address AI.<sup>5</sup> Part I examines the role of the courts in policing the inappropriate use of AI by attorneys.<sup>6</sup> Part II describes the courts’ utilization of AI in their operations, both in administrative applications and in researching and drafting judicial opinions and orders.<sup>7</sup> In both supervising attorneys’ and their own use of AI, courts have acted surprisingly proactively, spurred on by the rapid speed and powerful capabilities of emerging AI tools.<sup>8</sup>

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1. See, e.g., John G. Browning, *Should Judges Have a Duty of Tech Competence?*, 10 ST. MARY’S J. ON LEGAL MALPRACTICE & ETHICS 176, 177 (2020) (“judges across the country regularly exhibit ignorance or unwillingness to educate themselves about the technologies around which modern life revolves”); RICHARD SUSSKIND, *THE FUTURE OF LAW* 35 (1996) (“Traditionally, lawyers have not been thought to be good at dealing with change in the market places and environments in which they operate”).

2. Kierra Riley, *Courts Move Swiftly as AI Enters Legal System*, ARIZONA CAPITAL TIMES, (March 1, 2024), <https://azcapitoltimes.com/news/2024/03/01/courts-move-swiftly-as-ai-enters-legal-system/>.

3. *Id.*

4. *Id.*

5. See generally *infra* Sections I-III.

6. See *infra* Section I.

7. See *infra* Section II.

8. Riley, *supra* note 2.

## I. POLICING ATTORNEY USE AND MISUSE OF AI

A. *Case-by-Case Enforcement Against Attorney Misuses of AI*

Judges have been provoked by attorney misuse of AI to supervise and enforce against inappropriate use of AI in court filings by litigants.<sup>9</sup> The first, well-publicized example of such misuse was the citation by New York lawyer Steven A. Schwartz of non-existent case law fabricated by ChatGPT.<sup>10</sup> The AI program “hallucinated” by providing non-existent citations and then full-text fictional opinions of half a dozen non-existent cases to support the legal argument advanced by the attorney.<sup>11</sup> Although the improper reliance on fake cases was first identified by the opposing counsel, it was up to the judge in the case to determine the consequences of the lawyer’s error after ordering a hearing on the matter.<sup>12</sup>

After the hearing, Federal District Court Judge Castel found that the attorney and his firm had violated Rule 11 by acting in bad faith to mislead the court, and imposed sanctions of \$5,000.<sup>13</sup> The judge noted that “there is nothing inherently improper about using a reliable artificial intelligence tool for assistance,” but “existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings.”<sup>14</sup> The attorney and his law firm “abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.”<sup>15</sup>

The judge in this case noted the several potential harms that result from this inappropriate reliance on unvalidated AI outputs:

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

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9. *See generally* *Mata v. Avianca, Inc.*, 678 F.Supp. 3d 443, 466 (S.D.N.Y. 2023); *People v. Crabill*, No. 23PDJ067, 2023 WL 8111898 (Colo. O.P.D.J. Nov. 22, 2023); *Matter of Samuel*, 206 N.Y.S.3d 888, 891 (Sur. Ct. 2024).

10. 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>.

11. *Id.*

12. *Id.*

13. *Mata*, 678 F.Supp. 3d at 466.

14. *Id.* at 448.

15. *Id.*

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.<sup>16</sup>

To mitigate these potential harms, the judge, in addition to imposing financial sanctions, also ordered the offending attorney to send letters to the judges who allegedly issued the six bogus decisions cited by ChatGPT explaining what happened and apologizing for relying on the bogus opinions.<sup>17</sup>

This highly-publicized incident was followed by several other incidents of lawyers filing briefs with courts containing AI-fabricated citations, and the judges in those cases responded differently in the different contexts presented, including those found below.

### 1. *People v. Crabill*

In November 2023, the Colorado Supreme Court's attorney discipline office upheld the one-year suspension followed by a two-year probation for an attorney who filed a brief with the court containing false citations generated by AI.<sup>18</sup> The attorney initially falsely attributed the fake citations to a legal intern.<sup>19</sup> He was held to violate several rules of legal ethics, including the failure to meet the duty of competence, failure to act with reasonable diligence and promptness when representing a client, and knowingly making a false statement of a material fact or law to a court.<sup>20</sup>

### 2. *Matter of Samuel*

In a January 11, 2024 opinion, a New York state court struck the reply brief filed by a litigant because five of the six citations in the brief were fake citations created by AI.<sup>21</sup> The court noted that “[a]lthough the Court is dubious about using AI to prepare legal documents, it is not necessarily the use of AI in and of itself that causes such offense and concern, but rather the attorney’s failure to review the sources produced by AI without proper examination and scrutiny.”<sup>22</sup> In addition to rejecting the flawed reply brief and denying the motion which the brief was filed in support of, the court also indicated that sanctions against the offending attorney would be appropriate and would be considered in a future hearing.<sup>23</sup>

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16. *Id.* at 448-49.

17. *Id.* at 466.

18. *See generally Crabill*, 2023 WL 8111898, at \*1.

19. *Id.*

20. *Id.* at \*2.

21. *Matter of Samuel*, 206 N.Y.S.3d at 891.

22. *Id.*

23. *Id.* at 892.

### 3. *Park v. Kim*

The United States Court of Appeals for the Second Circuit dismissed an appeal filed by an attorney that included a false citation generated by AI in her brief on January 30, 2024.<sup>24</sup> The false citation appeared to be discovered by the court itself rather than opposing counsel. The offending attorney was referred for an investigation of possible disciplinary enforcement.<sup>25</sup>

### 4. *Smith v. Farwell*

On February 12, 2024, a state court in Massachusetts sanctioned an attorney \$2,000 for filing several pleadings containing “hallucinated” fake citations generated by AI.<sup>26</sup> The court itself seemed to discover the fake citations, noting that something seemed amiss with the cited authorities and spent “several hours” investigating the non-existent precedents.<sup>27</sup> The attorney blamed the errors on his younger lawyer assistants, expressed remorse to the court, and confessed his ignorance about AI.<sup>28</sup> In an erudite sixteen-page explanation of the risks and benefits of AI in legal practice, the court acknowledged its sanction of \$2,000 was “mild,” but warned that “[t]he blind acceptance of AI-generated content by attorneys undoubtedly will lead to other sanction hearings in the future, but a defense based on ignorance will be less credible, as the dangers associated with the use of Generative AI systems become more widely known.”<sup>29</sup>

### 5. *Kruse v. Karlen*

A Missouri Court of Appeals sanctioned on February 13, 2024, a pro se litigant for filing an appellate brief in which twenty-two of the twenty-four case citations were fabricated.<sup>30</sup> The court stated that it generally tries to provide pro se litigants some leeway, but “[f]iling an appellate brief with bogus citations in this Court for any reason cannot be countenanced and represents a flagrant violation of the duties of candor” all litigants owe the Court.<sup>31</sup>

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24. *Park v. Kim*, 91 F.4th 610, 612 (2d Cir. 2024).

25. *Id.* at 616.

26. *Smith v. Farwell*, No. 2282CV01197, at \*1 (Mass. Sup. Ct. Feb. 12, 2024) (Mass. Lawyers Weekly).

27. *Id.* at \*4 (Mass. Lawyers Weekly).

28. *Id.* at \*4-5 (Mass. Lawyers Weekly).

29. *Id.* at 15-16 (Mass. Lawyers Weekly).

30. *Kruse v. Karlen*, No. ED111172, 2024 WL 559497, at \*7 (Mo. Ct. App. Feb. 13, 2024).

31. *Id.* at \*9.

### 6. *In re Neusom*

On March 8, 2024, a federal district judge from the Middle District of Florida suspended an attorney for one year for filing a brief containing AI-created fabricated cases in violation of the rules of the court and Florida's Rule of Professional Conduct.<sup>32</sup> The matter had been referred to the court's grievance committee, which found that the attorney's conduct went "beyond a lack of due diligence as some of his legal authorities were completely fabricated."<sup>33</sup> The court's Grievance Committee stated that while "we understand that artificial intelligence is becoming a new tool for legal research, it can never take the place of an attorney's responsibility to conduct reasonable diligence and provide accurate legal authority to the Court that supports a valid legal argument."<sup>34</sup>

### 7. *United States v. Cohen*

Perhaps the most famous, or infamous, person to submit AI-generated fake citations to a court was former Trump attorney Michael Cohen.<sup>35</sup> Cohen, who is now disbarred, through his attorney David Schwartz, filed a motion for early termination of his supervised release.<sup>36</sup> Cohen assisted his lawyer by providing some citations produced by Google Bard, which turned out to be fake.<sup>37</sup> Neither Cohen nor Schwartz realized the citations were fake, nor did the opposing counsel representing the United States.<sup>38</sup> Another lawyer brought on to assist Cohen realized the citations were fake and notified the court.<sup>39</sup> The court denied Cohen's motion, but decided not to impose sanctions, as there was no deliberate bad faith.<sup>40</sup> Cohen had already been disbarred and thus was no longer subject to the rules of professional conduct, and Schwartz's "citation to non-existent cases is embarrassing and certainly

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32. *In re Neusom*, No. 2:24-mc-2-JES, 2024 WL 1013974, at \*4-5 (M.D. Fla. Mar. 8, 2024); See also Bob Ambrogi, *Federal Court Suspends Florida Attorney Over Filing Fabricated Cases Hallucinated by AI*, LAWSTITES (Mar. 24, 2024), <https://www.lawnext.com/2024/03/federal-court-suspends-florida-attorney-over-filing-fabricated-cases-hallucinated-by-ai.html#:~:text=On%20March%208%2C%20the%20U.S.,eligible%20to%20apply%20for%20reinstatement>.

33. *In re Neusom*, No. 2:23-cv-00503-JLB-NPM, 2024 WL 982508, at \*11 (M.D. Fla. Jan. 12, 2024).

34. *Id.* at \*10.

35. See generally *United States v. Cohen*, No. 18-CR-602 (JMF), 2024 U.S. Dist. LEXIS 48907, at \*3 (S.D.N.Y. Mar. 20, 2024).

36. *Id.* at \*2.

37. *Id.* at \*6.

38. *Id.* at \*7.

39. *Id.* at 5.

40. *Cohen*, 2024 U.S. Dist. LEXIS 48907 at \*14.

negligent, perhaps even grossly negligent. But the Court cannot find that it was done in bad faith.”<sup>41</sup>

This litany of attorney citations to fake AI-generated cases is almost certainly not the end of this sad demonstration of attorney incompetence, although hopefully, the lessons from these cases will provide most attorneys with appropriate caution in using and citing to AI-generated content.<sup>42</sup> At the same time, these examples show that courts have been primed and quite diligent in detecting AI “hallucinations” in court filings, in some cases detecting such fabrications even when opposing counsel did not detect the fake citations, although, we do not have any information on cases that have slipped through both counsel and the courts with fake AI citations.<sup>43</sup> But the fact that no such oversights have been detected after the fact is a hopeful indication of the courts’ thorough supervision.

### B. Court Standing Orders on AI

Spurred on by the growing list of attorney misuse of AI citations, several courts have tried to preempt such problems by issuing standing orders limiting or requiring disclosure of AI use in preparing pleadings filed with that court, and these standing orders all have their own wording and requirements.<sup>44</sup> Some simply require disclosure of the use of AI in preparing the document,<sup>45</sup> whereas others are more restrictive and prohibit the use of generative AI altogether.<sup>46</sup> Some are expressly limited to generative AI tools,<sup>47</sup> whereas others apply to any use of AI.<sup>48</sup>

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41. *Id.* at \*15-16.

42. *Kruse*, 2024 WL 559497, at \*9 (additional cases supporting are available at <https://www.ncsc.org/consulting-and-research/areas-of-expertise/technology/artificial-intelligence/state-activities/resource-center/caselaw-and-decisions>).

43. Weiser, *supra* note 10.

44. *Repository of Judicial Standing Orders Including AI Segments*, EDRM – AI ETHICS AND BIAS GROUP (Apr. 20, 2024), <https://edrm.net/judicial-orders-2/#>.

45. Judge Brantley Starr, *Mandatory Certification Regarding Generative Artificial Intelligence*, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, <https://www.txnd.uscourts.gov/judge/judge-brantley-starr> (last visited Aug. 8, 2024) (attorneys must file a certificate “attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy. . .”).

46. Order, ¶ 1 (Judge Christopher Boyko, N.D. Ohio), (“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”).

47. Order, ¶ 5, May 31, 2023 (Judge Gabriel Fuentes, N.D. Ill.), (“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.”).

48. Order, ¶ 1, June 5, 2023 (Judge Baylson, E.D. Penn.), (“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. “).

Recent expert opinion has skewed against the issuance and use of such judicial special orders.<sup>49</sup> Not only are the requirements inconsistent, but as AI has quickly been integrated into virtually all software programs, the use of AI is quickly becoming ubiquitous.<sup>50</sup> For example, Google Search uses AI and is now incorporating Google's Generative AI program Gemini.<sup>51</sup> Westlaw and Lexis have been using AI for many years and have now integrated generative AI into their platforms.<sup>52</sup> Microsoft is in the process of integrating its generative AI Co-Pilot product into its Windows 365 offerings, including Word.<sup>53</sup> So now, not only does virtually any software program an attorney uses incorporate AI, but AI can be used for many distinct functions, not simply drafting text.<sup>54</sup> It can be used for research, outlining, answering specific questions, editing and grammar review, and other applications.<sup>55</sup>

As noted by Louisiana Judge Scott Schlegel, a leading judicial expert on AI, “[w]ill the court require a certification if a lawyer simply uses generative AI to clean up a few paragraphs that don’t even contain a single case citation?”<sup>56</sup> Indeed, expert opinion on AI use recommends this type of iterative use of AI for more limited steps in researching and drafting documents, rather than asking the AI to just create an entire document.<sup>57</sup> Thus, requiring an attorney to certify every use of AI in preparing their filings seems unduly burdensome and wasteful. It is more effective to simply remind attorneys they have a duty to ensure the validity of all their arguments, including supporting citations pursuant to Rule 11, and their ethical duty of competence.

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49. Maura R. Grossman, et al., *Is Disclosure and Certification of the Use of Generative AI Really Necessary?*, 107 JUDICATURE 69, 69-70 (2023); Hon. Xavier Rodriguez, *Artificial Intelligence (AI) and the Practice of Law*, 24 SEDONA CONFERENCE J. 783, 800 (2023); Judge Scott Schlegel, *A Call for Education Over Regulation: An Open Letter*, (Nov. 28, 2023), <https://www.judgeschlegel.com/blog/-a-call-for-education-over-regulation-an-open-letter> (“an order specifically prohibiting the use of generative AI or requiring a disclosure of its use is unnecessary, duplicative, and may lead to unintended consequences.”).

50. Grossman, *supra* note 49.

51. Google, *Google AI Response Summary*, Google Search Engine (2024), <https://www.infotofind.com/web?q=gemini+ai+gemini+ai&qo=semQuery&tt=rmd&ad=semA> (last visited June 16, 2024).

52. Patrick Austin, *LexisNexis and Westlaw Will Launch AI Legal Research Tools*, NBI (July 20, 2023), <https://www.nbi-sems.com/Support/BlogDetail/159>.

53. Jared Spataro, *Introducing Microsoft 365 Copilot – Your Copilot for Work*, MICROSOFT (Mar. 6, 2023), <https://blogs.microsoft.com/blog/2023/03/16/introducing-microsoft-365-copilot-your-copilot-for-work/>.

54. *Repository of Judicial Standing Orders Including AI Segments*, *supra* note 44.

55. *Id.*

56. Schlegel, *supra* note 49.

57. Daniel Schwarcz & Jonathan H. Choi, *AI Tools for Lawyers: A Practical Guide*, 108 MINN. L. REV. 1, 6-7 (2023).

*C. Additional Oversight of Attorney Use of AI*

Courts have started taking some additional broader supervisory roles in attorney use of AI beyond just drafting briefs, for example, one court recently rejected a law firm's use of AI to buttress its request for legal fees.<sup>58</sup> The court was harsh in its criticism of the Cuddy Law Firm's attempted reliance on AI to support its claim:

It suffices to say that the Cuddy 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.<sup>59</sup>

Citing cases in which ChatGPT had produced fake citations, the judge 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.”<sup>60</sup>

In a preview of future cases involving AI-manipulated or fabricated images or videos, sometimes known as deep fakes, a Washington state judge recently rejected the use of a video in a murder case that had been “enhanced” with AI.<sup>61</sup> The defense attempted to “supercharge” the video by increasing the resolution of some blurry parts of a cell phone video using a machine learning software program.<sup>62</sup> The judge in the case rejected the admission of the enhanced video, finding that “admission of this AI-enhanced evidence would lead to a confusion of the issues and a muddling of eyewitness testimony, and could lead to a time-consuming trial within a trial about the non-peer-reviewable-process used by the AI model.”<sup>63</sup>

The examples in this section show that judges must be initiative-taking and diligent in policing appropriate and inappropriate use of AI by parties and the attorneys in litigation before them. This supervisory role of judges in

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58. *J.G. v. New York City Dep't of Educ.*, No. 23 CIV. 959 (PAE), 2024 WL 728626 at \*21 (S.D.N.Y. Feb. 22, 2024).

59. *Id.* at \*21-22.

60. *Id.* at \*23.

61. Tim Stelloh, *Washington State Judge Blocks Use of AI-enhanced Video as Evidence in Possible First-of-its-kind Ruling*, NBC NEWS (Apr. 2, 2024), <https://www.nbcnews.com/news/us-news/washington-state-judge-blocks-use-ai-enhanced-video-evidence-rcna141932>.

62. *Id.*

63. *Id.*

overseeing attorney use of AI will only expand and broaden going forward as AI and its legal applications continue to accelerate.

## II. USE OF AI BY JUDGES AND COURTS

The second role in which judges have been initiative-taking with regard to AI has been in promoting and ensuring the safe use of AI by judges and courts. Courts have taken a positive approach to the use of AI by courts while recognizing the need for caution and safeguards.<sup>64</sup> This proactive approach has been led both by nationwide judicial organizations as well as individual courts.<sup>65</sup>

### A. Nationwide Judicial and Court Organizations

The National Center for State Courts (“NCSC”) has provided leadership in preparing and adapting to AI for judges and court personnel at the national level, evidenced in the March 2020 publication titled “Introduction to AI for Courts” achieved through its Joint Technology Committee.<sup>66</sup> The concise abstract for the document demonstrates its purpose: “Many court technology systems today are leveraging some forms of AI. However, there are many more use cases where AI technologies might advantageously be brought to bear in the court setting.”<sup>67</sup> The document described several diverse ways courts were already implementing AI in 2020.<sup>68</sup> Such applications included using AI to scan incoming documents to file them automatically,<sup>69</sup> chatbots to communicate with the public,<sup>70</sup> workflow engines for automating case management,<sup>71</sup> identifying “red flags” in guardianship/conservatorship cases,<sup>72</sup> and triaging cases for automated case management.<sup>73</sup>

More recently, in response to the furor over generative AI after the release of ChatGPT4, the NCSC has created an “AI Rapid Response Team” in association with the Conference of Chief Justices to assist the courts in a timely response to new issues presented by AI.<sup>74</sup> Among other activities, the

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64. Lise Embley et al., *Introduction to AI for Courts*, NCSC, ii (Mar. 27, 2020), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0013/20830/2020-04-02-intro-to-ai-for-courts\\_final.pdf](https://www.ncsc.org/_data/assets/pdf_file/0013/20830/2020-04-02-intro-to-ai-for-courts_final.pdf).

65. *Id.*

66. *Id.*

67. *Id.* at 3.

68. *Id.*

69. *Id.*

70. Embley, *supra* note 64 at 4.

71. *Id.*

72. *Id.*

73. *Id.*

74. *AI Rapid Response Team*, NCSC, <https://www.ncsc.org/consulting-and-research/areas-of-expertise/technology/artificial-intelligence/state-activities/ai-rapid-response-team> (last visited Aug. 8, 2024).

NCSC AI Rapid Response Team has created a series of “interim guidance” documents for courts, with topics such as “Getting Started,”<sup>75</sup> “Talking Points,”<sup>76</sup> “Platform Considerations,”<sup>77</sup> “Developing an Internal AI Use Policy,”<sup>78</sup> “Judicial and Legal Ethics Issues,”<sup>79</sup> and “Deep Fakes.”<sup>80</sup> These one-page documents provide basic information on AI issues affecting courts in a clear, straightforward, and trustworthy format, while also recommending steps that courts can and should take, to take advantage of AI within ethical boundaries.<sup>81</sup> As the “Talking Points” guidance states, “AI is already having an impact on the courts, and we must be prepared and forward thinking when it comes to addressing how AI can be used effectively, efficiently, and ethically to promote the administration of justice.”<sup>82</sup>

The NCSC has generated other resources for judges and court staff to stay abreast on AI developments, including an active website with recent developments.<sup>83</sup> The NCSC produced a 30-page guidance document for example on court development and the use of AI chatbots.<sup>84</sup> The National Association for Court Management has identified many other early uses of AI by various U.S. courts, including court-operated robot assistants, automated workflows, document redaction, case management, and litigation analytics among others.<sup>85</sup> Other judicial and court organizations such as the National Judicial Center, The Conference of State Court Administrators

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75. *AI and the Courts: Getting Started*, NCSC (Mar. 2024), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0025/99232/RRT-AI-getting-started-march-2024.pdf](https://www.ncsc.org/_data/assets/pdf_file/0025/99232/RRT-AI-getting-started-march-2024.pdf).

76. *AI and the Courts: Talking Points*, NCSC (Feb. 2024), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0029/98255/RRT-AI-talking-points-February-2024.pdf](https://www.ncsc.org/_data/assets/pdf_file/0029/98255/RRT-AI-talking-points-February-2024.pdf).

77. *AI and the Courts: Platform Considerations*, NCSC (March 2024), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0026/99233/RRT-AI-platform-considerations-march-2024.pdf](https://www.ncsc.org/_data/assets/pdf_file/0026/99233/RRT-AI-platform-considerations-march-2024.pdf).

78. *AI and the Courts: Developing an Internal AI Use Policy*, NCSC (April 2024) [https://www.ncsc.org/\\_data/assets/pdf\\_file/0042/99978/ncsc-ai-rrt-developing-policies-april-2024.pdf](https://www.ncsc.org/_data/assets/pdf_file/0042/99978/ncsc-ai-rrt-developing-policies-april-2024.pdf).

79. *AI and the Courts: Judicial and Legal Ethics Issues*, NCSC (May 2024), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0010/101125/ncsc-ai-rrt-judicial-legal-ethics-may-2024.pdf](https://www.ncsc.org/_data/assets/pdf_file/0010/101125/ncsc-ai-rrt-judicial-legal-ethics-may-2024.pdf).

80. *AI and the Courts: Digital Evidence and Deep Fakes in the Age of AI*, NCSC (June 2024), [https://www.ncsc.org/\\_data/assets/pdf\\_file/0019/101683/ncsc-ai-rrt-deepfakes-june-2024.pdf](https://www.ncsc.org/_data/assets/pdf_file/0019/101683/ncsc-ai-rrt-deepfakes-june-2024.pdf).

81. See *supra* notes 74-80 and accompanying text.

82. *AI and the Courts: Talking Points*, *supra* note 76.

83. *Artificial Intelligence*, NCSC, <https://www.ncsc.org/consulting-and-research/areas-of-expertise/technology/artificial-intelligence> (last visited Aug. 8, 2024).

84. A. Souza & Z. Zarnow, *Court Chatbots: How to build a great chatbot for your court's website*, NCSC, [https://www.ncsc.org/\\_data/assets/pdf\\_file/0032/97187/Court-Chatbots.pdf](https://www.ncsc.org/_data/assets/pdf_file/0032/97187/Court-Chatbots.pdf) (last visited Aug. 8, 2024).

85. See Marcus W. Reinkensmeyer & Raymond L. Billotte, *Artificial Intelligence (AI): Early Court Project Implementations and Emerging Issues*, THE NATIONAL ASSOCIATION FOR COURT MANAGEMENT (Aug. 2019), <https://thecourtmanager.org/articles/artificial-intelligence-ai-early-court-project-implementations-and-emerging-issues/>.

(“COSCA”), the National Judicial College, and the American Bar Association have all sponsored numerous legal education events for judges and court personnel on AI and the law.<sup>86</sup>

### B. State Special Committees and Guidance

Many states have now established state special committees to explore and produce guidance on the use of AI in the legal system.<sup>87</sup> Many of these committees address the issues relating to attorney use of AI, but most are also addressing AI use by courts and judges, and many of the committees are set up and run by the state courts.<sup>88</sup> The guidance documents produced by these state committees to date are generally positive about the potential benefits of AI for courts, especially in administrative functions.<sup>89</sup> Most of the guidance documents also support the use of AI tools for legal research by judges, their clerks, and court staff attorneys. However, the documents also caution against the use of AI due to concerns about confidentiality, maintaining public trust, and using AI to decide the outcome of a case.<sup>90</sup> A few examples of such guidance documents are summarized below.

The West Virginia Judicial Investigation Commission issued an advisory opinion on the judicial use of AI on October 13, 2023.<sup>91</sup> The advisory opinion notes that AI has become ubiquitous and is already used by most people every day.<sup>92</sup> The opinion advises that “[j]udges have a duty to remain competent in technology, including AI. This duty is ongoing.”<sup>93</sup> With respect to preparing judicial opinions, “a judge may use AI for research purposes but may not use it to decide the outcome of a case. The use of AI in drafting opinions or orders should be done with extreme caution.”<sup>94</sup> Among the cautions provided

86. The author has spoken at AI and the law events sponsored by all of these organizations and can personally vouch for their existence.

87. *State Information on AI*, NCSC, <https://www.ncsc.org/consulting-and-research/areas-of-expertise/technology/artificial-intelligence/state-activities> (last visited Aug. 8, 2024).

88. For example, the author serves on the Arizona Steering Committee on Artificial Intelligence and the Courts established by the Arizona Supreme Court. See *Arizona Steering Committee on Artificial Intelligence and the Courts: Membership List*, AZCOURTS.GOV, <https://www.azcourts.gov/Portals/74/AISC%20Public%20Membership%20List%20052624.pdf> (last visited Aug. 8, 2024).

89. STATE BAR OF MICHIGAN, JUDICIAL OFFICERS MUST MAINTAIN COMPETENCE WITH ADVANCING TECHNOLOGY, INCLUDING BUT NOT LIMITED TO ARTIFICIAL INTELLIGENCE, ETHICS ADVISORY OPINION J1-155 (Oct. 27, 2023), [https://www.michbar.org/opinions/ethics/numbered\\_opinions/J1-155](https://www.michbar.org/opinions/ethics/numbered_opinions/J1-155) [hereinafter ETHICS ADVISORY OPINION J1-155].

90. JUDICIAL INVESTIGATION COMMISSION (WEST VIRGINIA), JIC ADVISORY OPINION 2023-22 (Oct. 13, 2023), [https://www.courtswv.gov/sites/default/pubfiles/mnt/2023-11/JIC%20Advisory%20Opinion%202023-22\\_Redacted.pdf](https://www.courtswv.gov/sites/default/pubfiles/mnt/2023-11/JIC%20Advisory%20Opinion%202023-22_Redacted.pdf) [hereinafter JIC ADVISORY OPINION 2023-22].

91. *Id.*

92. *Id.* at 4.

93. *Id.*

94. *Id.* at 5.

to judges are the risk of biased outputs by AI systems<sup>95</sup> and the risk of leaking confidential data in certain cases “like juvenile or abuse and neglect matters.”<sup>96</sup>

The State Bar of Michigan issued an ethical advisory opinion on judicial technological competence including AI a few days later on October 27, 2023.<sup>97</sup> The opinion notes that “AI is becoming more advanced every day and is rapidly integrating within the judicial system, which requires continual thought and ethical assessment of the use, risks, and benefits of each tool.”<sup>98</sup> The opinion noted the potential risks of AI including the potential for bias and fake content.<sup>99</sup> On the other hand, “there are times when, properly used, AI is an asset for the legal community, such as creating accurate content for pleadings and legal summaries, providing efficiency in docket management and legal research, and supplying answers to questions based on algorithms used by technological programs.”<sup>100</sup> The advisory opinion concludes with:

Judicial officers have an ethical obligation to understand technology, including artificial intelligence, and take reasonable steps to ensure that AI tools on which their judgment will be based are used properly and that the AI tools are utilized within the confines of the law and court rules. Further, as AI rapidly advances, judicial officers have an ethical duty to maintain technological competence and understand AI’s ethical implications to ensure efficiency and quality of justice.<sup>101</sup>

In January 2024, the New Jersey Supreme Court adopted a Statement of Principles (“Statement”) for the use of AI by New Jersey courts.<sup>102</sup> The Statement begins with the assertion that “the New Jersey Judiciary envisions the ongoing seamless integration of Artificial Intelligence (AI) technologies to further enhance court processes, improve and sustain services to the public, and uphold the rule of law.”<sup>103</sup> However, “[j]udges and their staff may use AI only for select purposes, such as for preliminary gathering and organization of information. AI will never be used to replace the autonomy of judges but may serve as a tool to support and enhance judicial

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95. JIC ADVISORY OPINION 2023-22, *supra* note 90 at 4-5.

96. *Id.* at 5.

97. ETHICS ADVISORY OPINION J1-155, *supra* note 89.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. NEW JERSEY SUPREME COURT, STATEMENT OF PRINCIPLES FOR THE NEW JERSEY JUDICIARY’S ONGOING USE OF ARTIFICIAL INTELLIGENCE, INCLUDING GENERATIVE ARTIFICIAL INTELLIGENCE (Jan. 23, 2024), <https://www.njcourts.gov/sites/default/files/courts/supreme/statement-ai.pdf?cb=bb093263> [hereinafter NJ USE OF ARTIFICIAL INTELLIGENCE].

103. *Id.* at 1.

functions.”<sup>104</sup> In addition, “[a]ll AI technologies will be continuously monitored, assessed, and refined as necessary in order to identify and remedy potential sources and effects of bias, to the extent possible.”<sup>105</sup> The need to protect confidentiality is also expressly called out in the Statement.<sup>106</sup> But the overall tenor is positive, “[e]xpanded Judiciary use of AI aims to improve effectiveness and consistency in court services, including case management, court administration, public accessibility, and transparency.”<sup>107</sup>

Perhaps the most extensive and comprehensive guidance to date for the judicial branch’s use of AI was issued by Connecticut on February 1, 2024.<sup>108</sup> This twenty-one page document provides a comprehensive use guide to the responsible use of AI in the courts, following the motto of “Meaningful Guardrails + Workforce Empowerment and Education + Purposeful Use = Responsible AI Innovation.”<sup>109</sup> The document establishes “policies and procedures” for Connecticut courts “concerning the development, procurement, implementation, utilization, and ongoing assessment of systems that employ AI.”<sup>110</sup> The guidance includes a comprehensive AI impact assessment methodology to ensure that AI is used in a safe, reliable, and unbiased manner that protects confidential and privileged information.<sup>111</sup>

Several other states have established AI judicial committees that have already issued guidance documents or are in the process of developing such guidance.<sup>112</sup> The significant resources and expedited timelines that state courts have committed to such efforts show the urgency and priority that the courts attach to obtaining the benefits of AI while ensuring it is used ethically and safely by the courts and the legal profession.

### C. *Judicial Use of AI to Decide Cases*

To date, no U.S. judges have publicly disclosed that they have used AI to make or draft their decisions. Perhaps the closest is an Ohio juvenile judge, Judge Anthony Capizzi, who trained and uses IBM Watson’s AI system to review the records of cases before him. Also, Judge Capizzi displays on a dashboard the key factors he has trained the AI to recognize, which is

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104. *Id.*

105. *Id.*

106. NJ USE OF ARTIFICIAL INTELLIGENCE, *supra* note 102 at 2.

107. *Id.*

108. STATE OF CONNECTICUT JUDICIAL BRANCH, JBAPPM POLICY 1013, ARTIFICIAL INTELLIGENCE RESPONSIBLE USE FRAMEWORK (Feb. 1. 2024), <https://www.jud.ct.gov/faq/CTJBRResponsibleAIPolicyFramework2.1.24.pdf>.

109. *Id.* at 1.

110. *Id.* at 4.

111. *Id.* at 13-21.

112. *State Information on AI*, *supra* note 87 (A continually updated listing of such initiatives is available).

important to his decision-making.<sup>113</sup> However, Judge Capizzi makes the final decisions, not the AI. Judge Capizzi stated “[t]he Watson Care system gives me the ability to truly spend almost all the time on the child and family’s needs. I’m not on the bench shuffling through paperwork.”<sup>114</sup>

Some judges in other countries have been even more proactive in using AI to draft or decide their case opinions and orders. China is probably the most advanced and prolific judicial user of AI, as judges in China frequently rely on centralized AI systems to issue or recommend decisions.<sup>115</sup> Judges in a number of countries – including India,<sup>116</sup> Dubai,<sup>117</sup> Peru<sup>118</sup> and Mexico,<sup>119</sup> have acknowledged using generative AI tools such as ChatGPT to draft judicial opinions or orders.<sup>120</sup> In the United Kingdom, the Courts and Tribunals Judiciary issued guidance allowing for the limited use of AI by judges in researching and writing opinions.<sup>121</sup> Following the release of this guidance, one of the top judges in England disclosed that he has used generative AI to write parts of his judicial opinions.<sup>122</sup> Specifically, he asks the AI to generate paragraph-length summaries of relevant legal doctrines that he is familiar with and can insert into his opinion after reviewing it for accuracy.<sup>123</sup> The judge knows the relevant legal doctrine well, but it saves him time to have AI generate the actual summary text he inserts into his opinion.

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113. Chris Stewart, *Hey Watson: Local Judge First to Use IBM’s Artificial Intelligence on Juvenile Cases*, DAYTON DAILY NEWS (Aug. 3, 2017), <https://www.daytondailynews.com/news/local/county-judge-first-use-ibm-watson-supercomputer-juvenile-cases/InVqz6eeNxvFsMVAe5zrBL/>.

114. *Id.*

115. Stephen Chen, *China’s Court AI Reaches Every Corner of Justice System, Advising Judges and Streamlining Punishment*, SOUTH CHINA MORNING POST (July 13, 2022), <https://www.scmp.com/news/china/science/article/3185140/chinas-court-ai-reaches-every-corner-justice-system-advising>; Tiffany Winfrey, *China Uses Artificial Intelligence (AI) to Run Courts, Supreme Justices: Cutting Judges’ Typical Workload By More Than a Third and Saving Billion Work Hours*, THE SCIENCE TIMES (July 14, 2022), <https://www.sciencetimes.com/articles/38760/20220714/china-now-runs-its-courts-supreme-justices-through-artificial-intelligence.htm>.

116. Ben Cost, *Judge Asks ChatGPT To Decide Bail In Murder Trial*, N.Y. POST (Mar. 29, 2023), <https://nypost.com/2023/03/29/judge-asks-chatgpt-for-decision-in-murder-trial/>.

117. Issac John, *Dubai To Use AI For ‘Litigation Without a Judge’*, KHALEEJ TIMES (Aug. 9, 2021), <https://www.khaleejtimes.com/technology/dubai-to-use-ai-for-litigation-without-a-judge>.

118. Juan David Gutiérrez, *Judges and Magistrates in Peru and Mexico Have ChatGPT Fever*, TECHPOLICY.PRESS (Apr. 19, 2023), <https://www.techpolicy.press/judges-and-magistrates-in-peru-and-mexico-have-chatgpt-fever/>.

119. *Id.*

120. *See supra* notes 116-119.

121. *Artificial Intelligence (AI) Guidance for Judicial Office Holders*, UNITED KINGDOM COURTS AND TRIBUNALS JUDICIARY (Dec. 12, 2023), <https://www.judiciary.uk/wp-content/uploads/2023/12/AI-Judicial-Guidance.pdf>.

122. Liam Tolen, *Lord Justice of Appeal Uses ChatGPT and “. . . put it in [his] Judgment”*, ASHFORDS (Sept. 14, 2023), <https://www.ashfords.co.uk/insights/articles/lord-justice-of-appeal-uses-chatgpt-and-put-it-in-his-judgment>.

123. *Id.*

After China, Brazil is the country whose judiciary has probably been the most aggressive in using AI to decide cases.<sup>124</sup> The nation has a massive backlog of undecided cases, which is severely hampering the administration of effective justice in that country.<sup>125</sup> The judiciary therefore decided to employ AI to quickly resolve a large number of cases and appeals.<sup>126</sup> Unfortunately, one Brazilian judge recently became the first judge to issue an opinion containing fake citations generated by AI.<sup>127</sup> This type of embarrassment is what is likely keeping many U.S. judges awake at night and carefully limiting the use of AI in their chambers when drafting opinions.

Some academic writers have speculated on the future reliance of AI to issue court decisions, and it is not far-fetched to believe, given the speed at which AI and its applications are advancing, that courts will use AI to issue at least preliminary decisions in lower stakes cases in the future.<sup>128</sup> These speculations became more real when 11<sup>th</sup> Circuit Judge Kevin C. Newsom issued a concurring opinion in which he used generative AI tools to help interpret the contractual term “landscape.”<sup>129</sup> In a thoughtful and insightful 15-page concurring opinion, Judge Newsome explained how generative AI could be used to help judges decide the plain meaning of statutory or contractual terms, even though the generative AI output was not needed to decide this particular case.<sup>130</sup> This judicial consideration of generative AI content, while potentially useful, also raises concerns about whether judicial recourse to such content violates rules against ex parte communications, as pointed out by Judge Schlegel.<sup>131</sup>

While AI is increasingly affecting judicial work, it will not replace judges any time soon. As U.S. Supreme Court Chief Justice John Roberts stated in his 2023 Year-End Report of the Federal Judiciary, which focused almost exclusively on how courts deal with technology and AI:

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124. Amy Guthrie, *Brazil's Overwhelmed Judiciary, Desperate for Help, Turns to Artificial Intelligence*, LAW.COM (Jan. 16, 2024), <https://www.law.com/international-edition/2024/01/16/brazils-overwhelmed-judiciary-desperate-for-help-turns-to-artificial-intelligence/> (Brazilian courts have a backlog of almost 80 million cases awaiting decision).

125. *Id.*

126. Guthrie, *supra* note 124; Eduardo Villa Coimbra Campos, *Artificial Intelligence, the Brazilian Judiciary and Some Conundrums*, SCIENCESPO (Mar. 3, 2023), <https://www.sciencespo.fr/public/chaire-numerique/en/2023/03/03/article-artificial-intelligence-the-brazilian-judiciary-and-some-conundrums/>.

127. Agence France Presse, *Brazil Judge Investigated for AI Errors in Ruling*, BARRONS (Nov. 13, 2023), <https://www.barrons.com/news/brazil-judge-investigated-for-ai-errors-in-ruling-c45e8f8f>.

128. Eugene Volokh, *Chief Justice Robots*, 68 DUKE L.J. 1135, 1156, 1183 (2019); Rebecca Crotoof, *Cyborg Justice” and The Risk of Technological–Legal Lock-In*, 119 COLUM. L. REV. FORUM 233, 251 (2019).

129. *Snell v. United Specialty Ins. Co.*, 102 F.4th 1208, 1221-1235 (11th Cir. 2024) (Newsom, J., concurring).

130. *Id.*

131. Judge Scott Schlegel, *The 11th Circuit's Experiment with AI: Balancing Innovation and Judicial Integrity*, LEGAL TECH (June 5, 2024), <https://judgeschlegel.substack.com/p/the-11th-circuits-experiment-with>.

I predict that human judges will be around for a while. But with equal confidence I predict that judicial work – particularly at the trial level will be significantly affected by AI. Those changes will involve not only how judges go about doing their job, but also how they understand the role that AI plays in the cases that come before them.<sup>132</sup>

As the judicial clerks flowing out of law school become more accustomed to using AI in their research and writing, as the technology continues to improve, and as many judges become more comfortable with using AI, it is probably just a matter of time before the first U.S. judge proclaims that he or she has used AI to help write their opinions.

### III. CONCLUSION

Courts and court organizations have become surprisingly proactive in policing the use of AI by attorneys practicing before them and in their own operations and activities. Judges, court personnel, and judicial organizations are aware of the enormous power and speed at which AI is advancing and have realized that if they do not actively prepare to ride the AI wave, they will quickly be crushed by this emerging force. Courts, judges, and court personnel realize that they cannot afford to delay or sit this one out, as they have tended to do with previous technological waves.<sup>133</sup> The actions that court organizations and courts have taken to date, both in policing AI use by attorneys practicing before them, and in planning for their own institutional, and personal use of AI, have been effective and balanced.<sup>134</sup> But the AI tidal wave is just beginning. As new AI tools and applications continue to be churned out by the technology industry, and as courts are forced to address new and emerging issues—such as deep fakes<sup>135</sup> and the unauthorized practice of law<sup>136</sup> by AI— courts and judges will continue to be challenged to stay proactive and knowledgeable in their response. In addition, as legislatures and regulatory agencies lag in their oversight of AI technology,

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132. Chief Justice Roberts, *2023 Year-End Report on the Federal Judiciary*, SUPREME COURT OF THE UNITED STATES (Dec. 31, 2023), <https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf>.

133. Reinkensmeyer & Billotte, *supra* note 85 (“Given the generally risk-averse nature of the judicial branch, the first types of court AI projects are a remarkable development.”).

134. *Id.*

135. See Cassandra Coyer, *Are Legal Proceedings, Courts and Laws Ready for the Rise of Deepfakes?* LAW.COM (Nov. 21, 2023), <https://www.law.com/legaltechnews/2023/11/21/are-legal-proceedings-courts-and-laws-ready-for-the-rise-of-deepfakes/>; Maura R. Grossman et al., *The GPTJudge: Justice in a Generative AI World*, 23 DUKE L. & TECH. REV. 1, 12 (2023).

136. See David Horrigan, *Can Software Engage in the Unauthorized Practice of Law?*, LAW.COM (June 23, 2022), <https://www.law.com/legaltechnews/2022/06/23/can-software-engage-in-the-unauthorized-practice-of-law/>.

in areas where technology outpaces the law,<sup>137</sup> courts will be forced to address the novel legal harms and rights raised by AI systems.<sup>138</sup> Gone are the days when judges could be non-technical generalists,<sup>139</sup> as judges need to be technologically competent and savvy to properly address the issues of today and tomorrow.

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137. GARY E. MARCHANT ET AL., *THE GROWING GAP BETWEEN EMERGING TECHNOLOGIES AND THE LAW: THE PACING PROBLEM 2* (2011).

138. Ryan Tracy, *Some of the Thorniest Questions About AI Will Be Answered in Court*, WALL ST. J. (Aug. 23, 2023), <https://www.wsj.com/tech/ai/some-of-the-thorniest-questions-about-ai-will-be-answered-in-court-e7fd444b>; Melissa Heikkila, *How Judges, Not Politicians, Could Dictate America's AI Rules*, MIT TECH. REV. (July 17, 2023), <https://www.technologyreview.com/2023/07/17/1076416/judges-lawsuits-dictate-ai-rules/>.

139. As Judge Posner stated in one of his opinions, “[t]he discomfort of the legal profession, including the judiciary, with science and technology is not a new phenomenon . . . . But it’s increasingly concerning, because of the extraordinary rate of scientific and other technological advances that figure increasingly in litigation . . . . The legal profession must get over its fear and loathing of science.” *Jackson v. Pollion*, 733 F. 3d 786, 787-88 (7th Cir. 2013).