

JANUARY 29, 2024

COMMENTS ON PROPOSED RULE* CHANGE TO FIFTH
CIRCUIT RULE 32.3 AND FORM 6

Comments are indexed in date order:

1. Peter J. Winders (2 emails were submitted by Mr. Winders), Carlton Fields, Tampa, Florida
2. Alan K. Goldstein, Law Office of Alan K. Goldstein, Napa, California
3. Hon. Xavier Rodriguez, United States District Judge, Western District of Texas, on behalf of himself and Prof. Maura Grossman of the University of Waterloo
4. Brian King, The King Firm, New Orleans, Louisiana
5. Joshua Cottle, Fridge & Resendez PC, San Antonio, Texas
6. Lance L. Stevens, Stevens Law Group, Brandon, Mississippi
7. Andrew Gould, Arnold & Itkin, Houston, Texas
8. Martin Stern, Adams and Reese LLP, New Orleans, Louisiana
9. Carolyn Elefant, Law Offices of Carolyn Elefant, Bethesda, Maryland
10. Shelby L. Shanks, Porter Hedges, Houston, Texas
11. Peter Wechsler, The Wechsler Law Group, LLC, Miami, Florida
12. David S. Coale, Lynn Pinker Hurst Schwegman, LLP, Dallas, Texas
13. Thomas C. Wright, Wright Close & Barger, LLP, Houston, Texas
14. Paul Sherman, Institute for Justice, Arlington, Virginia
15. Layne E. Kruse, Norton Rose Fulbright, Houston, Texas
16. Christopher M. Campbell
17. Andrew R. Lee, Jones Walker, New Orleans, Louisiana

[*Notice of Proposed Amendment to 5th Circuit Rule 32.3](#) (posted November 21, 2023).

Margaret Dufour

From: Winders, Peter J. <pwinders@carltonfields.com>
Sent: Monday, November 27, 2023 9:00 AM
To: Margaret Dufour
Subject: FW: 5th Cir bans GenAI- comments to proposed rule relating to Generative AI

CAUTION - EXTERNAL:

Respectfully, the proposed amendment does not address the fundamental dangers of using Generative AI for any legal analysis, and from relying on it at all. Please read the comments of my firm's President and CEO, which I endorse.



Peter J. Winders
General Counsel

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From: Sasso, Gary L. <gsasso@carltonfields.com>
Sent: Monday, November 27, 2023 9:30 AM
To: Winders, Peter J. <pwinders@carltonfields.com>; Hitson, Peter <PHitson@carltonfields.com>; Bailey, David W. <d Bailey@carltonfields.com>; Dupre, Steven C. <sdupre@carltonfields.com>
Cc: Sasso, Gary L. <gsasso@carltonfields.com>
Subject: FW: 5th Cir bans GenAI

This doesn't go far enough. Not even close. This is almost worse than no policy at all. They just don't get it.

So they let you use AI if you certify that a human has confirmed the "accuracy" of the brief. What this means is, you can ask ChatGPT to write a Fifth Circuit brief, and then ask a first year associate to cite check the authorities set forth in that brief to make sure (1) they exist and (2) the brief accurately reports what they say. Wonderful.

But what's missing is human research, knowing what authorities are out there, identifying and understanding different lines of legal analysis, identifying and understanding all authorities and doctrines that appear to be adverse, identifying and understanding all authorities and legal doctrines that are favorable but that may suggest different theories or approaches superior to what's in the brief, reconciling apparently conflicting authorities to determine what courts are actually doing, assessing such issues as preemption and choice of law, considering and applying various canons of construction when a matter may be governed by statute, even knowing whether any statutes or regulations are relevant, researching and understanding legislative history and common usage and considering extrinsic evidence, as appropriate in interpreting contracts or statutes, analyzing legal and factual arguments being made by the other side and responding to them or anticipating them, identifying and understanding emerging trends in the law, and balancing legal issues, policy issues, and factual nuances to come up with the best possible brief.

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."

Everyone seems to think the risk of generative AI is "hallucinations." Yes, that is an egregious risk. But nobody seems to get why those occur. They occur not because ChatGPT is playful or intentionally reckless, but because generative AI does not think. It does some "research," i.e., scanning the internet to the point where it has enough "data" (words) to commence composing a responsive narrative. Then it writes that narrative not based on comprehension, understanding, or analysis, but by "predicting" what a human might write working from whatever starting point it selects. This is not legal analysis. It's like "autocorrect" on our smart phones, which theoretical predicts which word we are trying to type and supplies the correct spelling when we type enough letters or when we make a spelling error. Autocorrect is notoriously defective and virtually useless. I have had situations where I get every letter of a word right except one, and autocorrect can't recognize or anticipate what I'm writing and help me get there.

And it doesn't matter whether you restrict the data base used by ChatGPT – or similar tools – to WestLaw or the law firm's own files. It still can't understand what it reads, it can't think, and it has no "idea" what it is saying about that data base in the ensuing narrative.

Please feel free to send this to the Fifth Circuit!!

Gary

Gary L. Sasso

President & CEO | Carlton Fields
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gsasso@carltonfields.com

From: Winders, Peter J. <pwinders@carltonfields.com>

Sent: Monday, November 27, 2023 7:08 AM

To: Sasso, Gary L. <gsasso@carltonfields.com>

Subject: 5th Cir bans GenAI

I am sure you saw this.

https://www.law360.com/legalethics/articles/1769645?nl_pk=1d71fd6a-5ff8-40d3-b6fc-86e6503318d0&utm_source=newsletter&utm_medium=email&utm_campaign=legalethics&utm_content=2023-11-27&read_more=1&nlsidx=0&nlaidx=0



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Margaret Dufour

From: Winders, Peter J. <pwinders@carltonfields.com>
Sent: Monday, November 27, 2023 10:00 AM
To: Margaret Dufour
Subject: Comment to the proposed rule on the use of Generative AI

CAUTION - EXTERNAL:

Earlier today, I forwarded to you an internal email concerning the proposed rule and the dangers of Generative AI in legal work. Perhaps I should have eliminated the parts intended to remain internal. In our firm, we have adopted a policy that GenAI not be used at all in production of legal product, and we have viewed with dismay the pronouncements of some lawyers that GenAI is reformative rather than potentially destructive to quality lawyering. I did not remove the internal parts because I thought they gave some flavor of the depth we have gone in addressing the problems that can be caused by GenAI, both in what it produces and what it can cause lawyers to overlook. I hope that decision was not seen as a lack of respect.

We understand how difficult it will be to address these problems by rule. Law firms struggle with them as well. Below is another suggestion that addresses the issue.



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From: Dupre, Steven C. <sdupre@carltonfields.com>
Sent: Monday, November 27, 2023 10:05 AM
To: Sasso, Gary L. <gsasso@carltonfields.com>; Winders, Peter J. <pwinders@carltonfields.com>; Hitson, Peter

CONFIDENTIAL-Privileged (see below)

These proposed changes appear to be the 5th Circuit’s first stab at any rule regarding generative AI. Perhaps we should provide some iteration of the following comments (modifying some of what Gary wrote):

- We urge you to strike out the text lined through below of the proposed change to rule 32.3, with corresponding changes to the certificate itself:

Fifth Circuit Rule 32.3

32.3. Certificate of Compliance. See Form 6 in the Appendix of Forms to the I APP. P. ~~Additionally, counsel and unrepresented filers must further certify generative artificial intelligence program was used in drafting the document prepared for filing, or to the extent such a program was used, all generated text, including citations and legal analysis, has been reviewed for accuracy and approved by a~~ A material misrepresentation in the certificate of compliance may result in striking the ~~document~~ and sanctions against the person signing the ~~document~~.

- If the Court is inclined to permit any use of generative AI, then we would urge that the word “human” referenced in the proposed rule change and the proposed form change, be replaced with the phrase “the lead lawyer signing the document” as depicted below, in order to :

Fifth Circuit Rule 32.3

32.3. Certificate of Compliance. See Form 6 in the Appendix of Forms to the I APP. P. ~~Additionally, counsel and unrepresented filers must further certify generative artificial intelligence program was used in drafting the document prepared for filing, or to the extent such a program was used, all generated text, including citations and legal analysis, has been reviewed for accuracy and approved by a~~ ~~counsel of record signing the document~~ ~~human~~. A material misrepresentation in the certificate of compliance may result in striking the ~~document~~ and sanctions against the ~~person signing the document~~.

- We make these comments because 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 the parties, but that will be binding on everyone in the Fifth Circuit and persuasive authority for the whole world. What lawyers are supposed to do in presenting arguments in this context is very important, consequential, and hard to do. The Court and its constituents deserve to be given the best possible work product by the parties' legal counsel, not some "app" that some "human" certifies they have "reviewed for accuracy" and "approved."

Clearly one major problem with generative AI is the risk that it will "hallucinate." Yes, that is an egregious risk. Those "hallucinations" occur not because ChatGPT is playful or intentionally reckless, but because generative AI does not think. It does some "research," i.e., scanning the internet to the point where it has enough "data" (words) to commence composing a responsive narrative. Then it writes that narrative not based on comprehension, understanding, or analysis, but by "predicting" what a human might write working from whatever starting point it selects. This is not legal analysis. It's like "autocorrect" on our smart phones, which theoretical predicts which word we are trying to type and supplies the correct spelling when we type enough letters or when we make a spelling error. Autocorrect is notoriously defective and virtually useless. I have had situations where I get every letter of a word right except one, and autocorrect can't recognize or anticipate what I'm writing and help me get there.

And it doesn't matter whether you restrict the data base used by the generative AI program – or similar tools – to WestLaw or the law firm's own files. The generative AI program still can't understand what it reads, it can't think, and it has no "idea" what it is saying about that data base in the ensuing narrative.



Steven C. Dupre
Attorney at Law

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From: Sasso, Gary L. <gsasso@carltonfields.com>

Sent: Monday, November 27, 2023 9:30 AM

To: Winders, Peter J. <pwinders@carltonfields.com>; Hitson, Peter <PHitson@carltonfields.com>; Bailey, David W. <dbailey@carltonfields.com>; Dupre, Steven C. <sdupre@carltonfields.com>

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Subject: FW: 5th Cir bans GenAI

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Margaret Dufour

From: Alan Goldstein <alan@alankgoldsteinlaw.com>
Sent: Tuesday, November 28, 2023 4:52 PM
To: Margaret Dufour
Cc: Dean Allen Sutherland (deans@jeanrem.com)
Subject: Comment Regarding Proposed Change to the Fifth Circuit Certificate of Compliance

CAUTION - EXTERNAL:

Dear Sir or Madam:

I am admitted to practice before the U.S. Court of Appeals for the Fifth Circuit. I am emailing to offer a comment regarding what I am informed is a proposed change to the court's applicable rule concerning the Certificate of Compliance as set forth below in red font:

"32.3. Certificate of Compliance. See Form 6 in the Appendix of Forms to the Fed. R. App. P. **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**."

I appreciate the value of requiring confirmation that submissions to the court have not been created by generative artificial intelligence but am surprised by the proposal to allow use provided the material was "**reviewed for accuracy and approved by a human.**" (my emphasis added) I would consider it more appropriate to require such review and approval by "an attorney admitted to practice before this court and/or someone working under their direct supervision." If the filer is unrepresented by counsel, I would think that the filer, not "a human," would be the person who must review the generative AI material for accuracy and approval. But as a general matter, in all cases in which filers are represented by counsel, an attorney, not just any human, should be responsible for the content of the filing. I suppose the attorney's certification offers some protection against abuse even if "a human" rather than an attorney performs the review and approval, but that nevertheless seems like a half-measure since the actual review and approval of the AI material would not have been performed by an attorney or someone acting under their direct supervision in the proposed rule change. Respectfully, lawyers, not just anybody, should be responsible for the content of submissions to the U.S. Court of Appeals when the filer is represented by counsel.

Thank you for your consideration.

Very truly yours,



LAW OFFICE OF

ALAN K. GOLDSTEIN

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This e-mail and any attachment(s) to it from Law Office of Alan K. Goldstein contain privileged and confidential information intended only for the use of the recipient(s) named on the e-mail. If the reader of this e-mail is not the intended recipient, or the employee or agent responsible for delivering it to the intended recipient, you are hereby notified that reading it is strictly prohibited. If you have received this e-mail in error, please immediately return it to the sender by clicking "reply" and "send," and please delete it from your system. Thank you for your consideration.

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Margaret Dufour

From: Xavier Rodriguez
Sent: Tuesday, November 28, 2023 5:15 PM
To: Margaret Dufour
Subject: Proposed Rule 32.3

On behalf of myself and Prof. Maura R. Grossman of the Univ. of Waterloo, we respectfully suggest the following to be technology neutral in tone. See Maura R. Grossman, Paul W. Grimm & Daniel G. Brown, Vol. 107 No. 2, *Judicature*, Is disclosure and certification of the use of generative AI really necessary (2023).

32.3. Certificate of Compliance. See Form 6 in the Appendix of Forms to the Fed. R. App. P. **Additionally, counsel and unrepresented filers must further certify that all citations and legal analysis has been reviewed for accuracy.** A material misrepresentation in the certificate of compliance may result in striking the **document** and sanctions against the person signing the **document**.



Xavier Rodriguez

United States District Judge
Western District of Texas
262 W. Nueva Street
San Antonio, Texas 78207
Office: 210-472-6575

Xavier_Rodriguez@txwd.uscourts.gov

Margaret Dufour

From: Brian King <bking@kinginjuryfirm.com>
Sent: Wednesday, November 29, 2023 9:21 AM
To: Margaret Dufour
Subject: Comment on Proposed Amendment to 5TH CIR. R. 32.3

CAUTION - EXTERNAL:

The proposed rule change is unnecessary. 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 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. As an example, before "AI" became a thing, a lawyer could find an unrelated brief on the Internet, or copy caselaw or statutes without making sure they are up to date or even real, and paste them into a brief. We don't need a special rule to say those specific acts are wrong. For the same reason, we don't need a special rule to say using "AI" without checking it is wrong.

Court rules singling out the supposed unique dangers of "AI", are not necessary and bound to become relics. If everything of similar level of *intrinsic, unique* importance (i.e., low) had to be included in a certificate to a brief, the certificates would soon be longer than the briefs themselves. "AI-focused court rules", like Cabbage Patch Kids, pet rocks, and fidget spinners, are a passing fad that may bring us some amusement but add nothing to substance.

--

Brian King
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Margaret Dufour

From: Josh Cottle <Josh@texasbanklawyer.com>
Sent: Thursday, November 30, 2023 10:49 PM
To: Margaret Dufour
Subject: comment on proposed rule and form changes re: Artificial Intelligence

CAUTION - EXTERNAL:

Good evening,

Rule 11(b) seems to address the concern underlying the proposed amendment to the Court's Rule 32.3.

A party's or lawyer's signature certifies the good faith, truthful nature of the filing. Neither party nor lawyer can evade the duty to make truthful arguments by blaming their associates, paralegals, or GPTs. Whether it is a lawyer completely missing the point of a case or a GPT citing a non-existent authority, the mistake is equivalent. Good counsel double-check cases to make sure their counterparts correctly stated the law. GPT does not change this. In short, Rule 11(b) does the heavy lifting the proposed rule seeks to additionally regulate.

Thank you.

P.S. The following version of the preceding argument came from my prompts to ChatGPT 3.5. I edited the resulting output to remove text I did not think advanced the general argument I made above. I imagine, as such tools become part of daily life, that no capable user will submit generated materials without some revisions.

"The proposed rule under consideration aims to address concerns regarding the certification of AI-generated content. However, it's essential to recognize that the existing Federal Rule of Civil Procedure 11(b) already provides a comprehensive framework that effectively addresses these concerns.

Rule 11(b) mandates that all submissions to the court, whether generated by human attorneys or AI tools, must adhere to the highest ethical standards. It requires that legal contentions be well-founded in existing law and that factual contentions be supported by evidence or a reasonable expectation of such support after further investigation or discovery. Additionally, Rule 11(b) demands that submissions not be used for improper purposes, such as harassment or causing unnecessary delay.

Our legal system values responsibility, adherence to the rule of law, and ethical conduct in legal practice. Rule 11(b) embodies these principles by placing a premium on the integrity of legal filings, irrespective of their origin. It emphasizes individual accountability and the necessity of presenting claims and defenses based on legitimate legal and factual foundations."

Thank you very much for your review of my comment.

Joshua Cottle

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December 5, 2023

Clerk of Court, Lyle W. Cayee
U.S. Court of Appeals for the Fifth Circuit
ATTN: Rule Changes
600 South Maestri Place
New Orleans, LA 70130

Re: Fifth Circuit Rule 32.3. Certificate of Compliance

Dear Lyle:

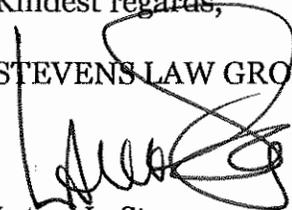
I approve of the proposed Rule, with one caveat.

I do not believe “by a human” is a strict enough standard. I do not believe that the minimum standard of care for a competent, reasonably prudent lawyer would allow any “human” to confirm his or her cites and the propositions espoused in a brief that is utilizes. Even setting aside lazy, hallucinating AI citations, this is an inappropriate standard for review of any cites. It would be problematic if such a rule became the “standard of care.”

While my usually sharp wordsmithing talents escape me at this moment, some adjective(s) or adverb(s) would better accomplish this legitimate goal. The descriptions running through my head right now, like “reasonably competent human” or “capable professional human” just seem to miss the mark. I defer to the wealth of scholarly talent at this Court’s disposal to overcome my lapse.

Kindest regards,

STEVENS LAW GROUP PLLC



Lance L. Stevens

LLC:eap

Margaret Dufour

From: Andrew Gould <agould@ArnoldItkin.com>
Sent: Friday, December 8, 2023 9:34 AM
To: Margaret Dufour
Subject: Comment regarding Proposed Amendment to 5th Cir. R. 32.3

CAUTION - EXTERNAL:

Dear Mr. Cayce:

I write concerning the Proposed Amendment to 5th Cir. R. 32.3. While the rapid advance of generative AI supports the Court's effort to ensure accuracy in briefs, I respectfully believe the proposed amendments as drafted could have unintended, undesirable decisional effects. I believe a more narrowly drafted rule and form—suggested drafts of which I provide below—provide a more suitable way to addressing the Court's concern in ensuring accuracy in briefs without such potential negative effects.

To begin, I have not used generative AI tools in any of my appellate briefs—whether before this Court or others. But like any good lawyer, it is incumbent upon me to keep abreast of all technological tools that could improve my research and advocacy. (Indeed, Comment 8 to Rule 1.01 of the Texas Disciplinary Rules of Professional Conduct require an attorney's competence "with relevant technology.") Westlaw Precision has recently introduced an AI search function, which I have begun experimenting with. I imagine that I may begin to use this function as part of my briefing process, even if only to double-check my traditional legal-research methodology—especially as the AI tool undoubtedly improves over time. Of course, I would never simply rely on what the AI search said; I would actually read the cases provided.

Still, as I read the Rule, I ask myself: Would I need to check the Proposed Form 6's second box? While I have not used generative AI to literally *draft* the brief, one could say that I have used generative AI as part of drafting the document: in locating the document's underlying legal research. When it comes to candor before the Court, I always lean on the side of disclosure.

That leads me to my concern about the proposed amendment's unintended, undesirable decisional effects. Say the answer to my above question is "yes." Would my brief be viewed more skeptically by members of the Court? I would certainly hope not, but I nonetheless would have concern that a member of the Court might view my brief with more skepticism because I used generative AI, even if I did so in a responsible and ethical manner. And even if the answer to my above question is "no," what happens when these generative-AI capabilities improve such that their use in pure drafting becomes more commonplace? To that end, while I (and other appellate lawyers) may not currently use generative AI to literally

draft any portion of my briefs, that very well may change in the future as the technology undoubtedly improves. Here as well, I would not want my brief to be viewed more skeptically by members of the Court when I have used AI in a responsible, ethical manner.

Again, I fully support the Court's effort to ensure accuracy in briefs given the rise of generative AI, especially in light of well-documented abuses by lawyers and pro se filers in the use of AI. But I believe that concern could be fully addressed, without potential unintended decisional effects, by a more narrowly drafted rule and form. Here is what I might suggest (the red is the original proposed amended text; the bolded, underlined blue are my changes):

32.3. Certificate of Compliance. See Form 6 in the Appendix of Forms to the Fed. R.

App. P. ~~Additionally, counsel and unrepresented filers must further certify that~~ **to the extent any** ~~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**.

Form 6 . . .

3. This document complies with the AI usage reporting requirement of 5th Cir. R. 32.3 because, **to the extent any generative artificial intelligence program was used in the drafting of this document, all generated text—including all citations and legal analysis—has been reviewed for accuracy and approved by a human.**

~~—no generative artificial intelligence program was used in the drafting of this document, or~~

~~—a generative artificial intelligence program was used in the drafting of this document and all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human.~~

In my view, these suggestions (which undoubtedly could be improved upon) address the Court's concern with ensuring accuracy in briefs, while not unintentionally penalizing lawyers or pro se filers for the ethical and responsible use of AI tools.

To the extent I can be of any further assistance, please do not hesitate to contact me. Thank you for the opportunity to comment and for your consideration.

Sincerely,
Andrew Gould

Andrew Gould
Appellate Lawyer



t (713) 222-3800 6009 Memorial Drive
f (713) 222-3850 Houston, TX 77007

arnolditkin.com    

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Margaret Dufour

From: Martin Stern <Martin.Stern@arlaw.com>
Sent: Friday, December 15, 2023 7:14 AM
To: Margaret Dufour
Subject: Proposed Change to Fifth Circuit Rule 32.3 regarding generative artificial intelligence

CAUTION - EXTERNAL:

Good morning,

For a thoughtful discussion of this issue, which mentions local rules being adopted by courts across the nation, here is an interview of Andrew Miller, a Clinical Lecturer at Yale Law School, that aired this morning:

<https://www.npr.org/2023/12/15/1219512064/recent-cases-raise-questions-about-the-ethics-of-using-ai-in-the-legal-system>

Personally, I'm not sure an amendment is necessary as a lawyer already has to sign and vouch for everything in the brief. But putting that to the side, as I read the proposed amendment, it would not prohibit the use of generative artificial intelligence for "legal analysis" or even for drafting the "text" of a brief. With that in mind, if 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.

I hope this small point is helpful.

Happy Holidays,
Martin

Martin Stern | [ADAMS AND REESE LLP](#)

Partner

Appellate Team Leader and Firm General Counsel

701 Poydras Street, Suite 4500 | New Orleans, LA 70139

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Carolyn@carolynelefant.com | LawOfficesofCarolynElefant.com | licensed in MD, DC, NY

January 1, 2024

BY EMAIL

Clerk of the Court
U.S. Court of Appeals
for the Fifth Circuit
600 South Maestri Place
New Orleans, Louisiana 70130
Changes@ca5.uscourts.gov

Re: Proposed Change to L.R. 32.3 and Form 6

To the Clerk of the Court,

My name is Carolyn Elefant. As a member of the Fifth Circuit bar, I write to oppose the proposed rule change to require disclosure of generative AI and certification of review and human approval of AI-generated citations and analysis. Singling out only generative AI products for verification creates a double standard and impractical burdens for attorneys, while disclosure requirements threaten the sacred attorney work product privilege. To the extent that the prevalence of false citations remains a concern, the appropriate remedy is to require all litigants to verify the accuracy cases and arguments included in their submissions, whether generated by AI, plucked from a recycled, cut-and-past brief or unearthed from the pages of a hardbacked federal court reporter on a law library shelf.

1. The proposed rule unfairly targets AI-generated research even though the problem of inaccurate citation long predates AI.

Long before last year's public launch of ChatGPT, false and inaccurate citations appeared in court briefs. Indeed, some prisoner brief-writers rivaled Chat GPT's imagination, as described in a decades-old Supreme Court case.

Some of the not too subtle subterfuges used by a small minority of writ-writers would tax the credulity of any lawyer. One writ-writer simply made up his own legal citations when he ran short of actual ones. In one action against the California Adult Authority involving the application of

administrative law, one writ-writer used the following citations: *Aesop v. Fables*, *First Baptist Church v. Sally Stanford*, *Doda v. One Forty-four Inch Chest*, and *Dogood v. The Planet Earth*. The references to the volumes and page numbers of the nonexistent publications were equally fantastic, such as *901 Penal Review*, page 17,240. To accompany each case, he composed an eloquent decision which, if good law, would make selected acts of the Adult Authority unconstitutional. In time the 'decisions' freely circulated among other writ-writers, and several gullible ones began citing them also.¹

Inaccurate citations are not limited to filings by prisoners and lay litigants. cursory research reveals numerous examples predating the availability of ChatGPT where lawyers miscited cases,² or relied on a non-existent statute³ or outdated caselaw.⁴

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. To the extent that pervasive miscitation remains a concern, the proposed rule should require lawyers to certify that a human verified the accuracy of all research and arguments contained in filings, and not just those generated by AI.

2. The proposed rule is impossible to implement without undue burden on filers.

The rule would also impose an impractical burden by expecting lawyers to somehow discern when a research tool relies on generative AI, which is often proprietary or opaque. For example, in a recent case involving fake citations by former Trump counsel Michael Cohen, Mr. Cohen admitted that he relied on Google Bard, but believed that it was a “super charged search engine” rather than an AI-powered tool.⁵

Closer to home, in preparing these comments, I used Casetext’s traditional search feature to locate the cases cited herein. I am aware that Casetext’s Co-Counsel tool (which I did not rely on because the preliminary results were not adequate) employs generative AI, but I do not know and could not figure out whether AI is also a part of the search features.

¹ *Cruz v. Beto*, 405 U.S. 319, 328 n.7 (1972).

² *Moore v. Nicole Hupp & Assocs.*, 23-cv-4334, at *2 n.1 (N.D. Ill. Oct. 31, 2023)(This is not the only instance of a mis-citation or misrepresentation of precedent in Hupp's brief...Counsel is advised to exercise greater care when citing and quoting case law in future proceedings”); *Glenn v. First Nat. Bank in Grand Junction*, 868 F.2d 368, 372 n.1 (10th Cir. 1989)(noting multiple miscitations)

³ *In re Schivo*, Case No.: BK-S-05-28163-BAM at *9, n. 13(Bankr. D. Nev. Dec. 10, 2010)(relying on law that attorney failed to verify had actually been passed).

⁴ *Mardirossian & Associates, Inc. v. Ersoff*, No. B182966, at *1 (Cal. Ct. App. July 13, 2007)(“Its impossible [for] competent counsel [] to use a case and not shepardize it and not realize that the same case [had been] modified a year later.”), *Fletcher v. State of Florida*, 858 F. Supp. 169, 172 (M.D. Florida 1994)(noting failure to shepardize resulted in citation to overruled cases).

⁵ *The Verge* (December 29, 2023), online at <https://www.theverge.com/2023/12/29/24019067/michael-cohen-former-trump-lawyer-google-bard-ai>

Moreover, I only employed one research tool for these comments. Like most lawyers, I often rely on multiple research tools and products to prepare a federal appellate filing. Determining whether some or all of these products utilize AI for purposes of compliance with the proposed certification is both unduly burdensome and infeasible.

The rule is also unclear on what types of AI usage would trigger disclosure. For these comments, I used both Anthropic's Claude and Chat GPT to refine my outline and wordsmith a handful of sentences. Would these minor editorial necessitate disclosure and verification under the proposed rule? Generative AI, though widely adopted, is truly still in its nascency when it comes to use cases which emerge on a near-daily basis. As a result, attempts to regulate disclosure raise more questions than answers, making the proposed rule difficult to enforce.

3. Mandating disclosure of AI tools undermines the work-product privilege.

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

4. Conclusion

To be sure, false citation is a problem, but one that long predates the launch of Chat GPT. Inaccurate citations do not result from use of generative AI, but instead from sloppy or irresponsible lawyering and the inaccessibility of obscure or hidden cases (*e.g.*, unpublished decisions or unreported bench rulings from lower state courts) that drives lawyers to seek out workarounds. While the court's concern over inaccurate citations is understandable, the proposed rule unfairly targets AI tools instead of addressing the broader issue of false citations by human researchers. Requiring disclosure and certification of AI usage creates an impractical burden for filers and risks undermining attorney work product protections and deterring lawyers from using these promising new research tools.

Courts already have a remedy for false citation in the form of Rule 11 which has been employed in the past to sanction lawyers for inaccuracies and sloppy research.⁶ However,

⁶ See, *e.g.* *Deters v. Davis*, Civil Action No. 3: 11-02-DCR, at *1 (E.D. Ky. June 13, 2011)(imposing Rule 11 sanctions for deficiencies in resources resulting in citations that *were blatantly incorrect and contrary to all precedent...*) *Blake by and Through Blake v. National Cas. Co.*, 607 F. Supp. 189, 191 (C.D. Cal. 1984)(imposing Rule 11sanctions on lawyer for doubling down in reliance on overruled precedent), *Smith v. United Transp. Union Local No. 81*, 594 F. Supp. 96, 100 (S.D. Cal. 1984)([Rule 11]

should the court find Rule 11 inadequate, rather than singling out AI, the court should consider revising the rule to mandate that all attorneys certify human verification of citations, statutes, and case law prior to submission regardless of whether the research originated from an AI tool or traditional search method. This approach balances the need to deter false citations while avoiding discrimination against particular research methods. Ultimately, the responsibility lies with attorneys to confirm the validity of research incorporated into court filings, not with the type of tools used to locate that research initially.

Thank you for the opportunity to file these comments.

Respectfully submitted,



Carolyn Elefant
Law Offices of Carolyn Elefant

,

thus requires attorneys to inquire into the state of the law and the facts before making arguments to the court and to offer only those arguments which are supported by the law”)

Margaret Dufour

From: Shanks, Shelby L. <SShanks@porterhedges.com>
Sent: Tuesday, January 2, 2024 3:27 PM
To: Margaret Dufour
Subject: Proposed changes to Rule 32.3

CAUTION - EXTERNAL:

Dear Clerk:

I oppose the proposed amendment to Rule 32.3 of the 5th Circuit Court of Appeals. This rule, requiring lawyers to disclose and potentially limit the use of generative artificial intelligence (AI) in legal drafting, is misguided and detrimental to the legal profession and the administration of justice.

The Proposed Changes to Rule 32.3:

1. **Create undue burdens and unnecessary complexity:** The proposed rule 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. Additionally, the lack of clarity in defining "drafting" within the context of vendor tools like Westlaw, Lexis, Bloomberg, Fastcase/VILex, Google Scholar and other existing research platforms introduces needless complexity and confusion. These tools have all incorporated AI into search for over a decade. Is the court prepared to delineate what is "generative AI" and what is "natural language processing?"
2. **Discrimination against technology:** This rule unfairly singles out generative AI as a tool in need of special regulation, ignoring the widespread use of other, arguably more impactful technologies in legal practice. It risks creating a precedent for discriminatory regulation against future technological advancements.
3. **Focus on quality, not tools:** The focus of legal practice should be on the quality of legal work, not the specific tools used. Rule 32.3 risks diverting attention from substantive legal issues towards irrelevant disclosure requirements, potentially slowing down case progress and impacting client service. The proposed language, which permits sanctions upon violation, could potentially instigate unnecessary and complex disputes concerning the alleged use of generative AI in document drafting.
4. **Existing standards already address accuracy and ethics:** Lawyers already have ethical obligations to ensure the accuracy and quality of their work, regardless of the tools used. These established ethical principles remain paramount and address issues like the citation of nonexistent cases or untenable interpretations of actual cases. The proposed rule introduces an additional layer of inquiry that duplicates existing safeguards without providing a corresponding benefit.
5. **Potential for bias and inconsistency:** The subjective nature of the proposed rule raises concerns about potential bias and inconsistency in its application. What constitutes AI usage? Who decides on the accuracy of AI-generated text? These subjective measures leave room for inconsistent interpretations.

Conclusion:

The proposed Rule 32.3 is unnecessary, harmful, and counterproductive. It imposes undue burdens, creates confusion, and diverts attention from core legal priorities. I urge the Court to reconsider this proposal.

Shelby L Shanks

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Margaret Dufour

From: Peter Wechsler <peterwechsler@gmail.com>
Sent: Wednesday, January 3, 2024 9:24 AM
To: Margaret Dufour
Cc: peterwechsler
Subject: Comments on AI Certifications
Attachments: ChatGPT-Fake Opinions.pdf; Fifth Circuit Considering AI Certification Rule.pdf; Judge Brantley Starr's AI Certification Rule.pdf; Last Day for AI Certification Comments.pdf; AI Certification Judge Brantley Starr.pdf; Michael Cohen admits to inadvertently citing fake cases generated by AI in legal motion.pdf; Daily Business Review.pdf; Who Can Write a Better Brief - July_Aug 2023 (1).pdf

CAUTION - EXTERNAL:

Dear Clerk of Court for the U.S. Court of Appeal for the Fifth Circuit, I have followed the use of AI in the legal arena where attorney's have filed briefs using AI, which gave them bogus cases that did not exist. I am in favor of your court amending it's rules to require an AI certification. Attached are some articles and information as to what other Judges are doing. Please submit my comments to the Court. Thank you.

Regards, Peter Wechsler

--

Peter L. Wechsler, Esq.
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Judge Brantley Starr

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Judge Specific Requirements

Mandatory Certification Regarding Generative Artificial Intelligence

All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being. 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. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from a party who fails to file a certificate on the docket attesting that they have read the Court's judge-specific requirements and understand that they will be held

responsible under Rule 11 for the contents of any filing that they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing. [A template Certificate Regarding Judge-Specific Requirements is provided here.](#)

COVID-19 Procedures

Effective 6/12/2020: [COVID-19 Standing Rules for Proceedings in the Courtroom of the Honorable Brantley Starr in the Earle Cabell Federal Building and United States Courthouse](#)

Copy Requirements for Electronic Filing

Effective 3/24/2020 – Judge Starr has temporarily suspended the requirement for a judge’s copy of a document electronically filed. A judge’s copy of a document electronically filed is not required.

Submission of Proposed Orders

All motions require a proposed order that must be emailed to Starr_Orders@txnd.uscourts.gov and must be in a Word format (not PDF). The subject line of the email must include the case number and the document number of the referenced motion.

I. Criminal Sentencing

- a. Filings within 1 Week of Sentencing: The Court strongly desires to read and carefully consider each filing before sentencing. If either party makes a filing less than 7 days before the date of the sentencing hearing, the Court reserves the right to unilaterally reset the sentencing for a future week.
- b. Lengthy sentencings: Sentencings last 30–45 minutes on average. The Court plans its criminal calendar around this average. If your sentencing is going to run longer than average (due to witness testimony or live character witnesses), please inform the courtroom deputy at least 1 week before sentencing. The Court may need to continue your sentencing to allow for sufficient time for your case.

II. Trial

a. Pre-Trial Filings

- i. Deposition Designations: The Court wants parties to submit deposition page/line designations and objections for only witnesses who are unavailable under the Federal Rules or Civil Procedure 32. There is no need for deposition designations for live witnesses. The Court’s scheduling orders require a joint filing with all designations, citing to the Federal Rule of Evidence number for each page/line objection, an explanation of objections and responses, and the full depositions. The purpose of the objections and responses in explanatory form is to enable the Court to rule on them in writing. This means the written explanation and response substitutes for a sidebar discussion of an objection. The Court will rule on the objections in time to edit the deposition video or transcript before trial.
- ii. Voir dire: The Court asks a round of voir dire questions first, focusing on who prospective jurors know, whether they have served as jurors before, what the burden of proof is, whether they can follow the law, and whether they have valid excuses to not serve. The Court also allows counsel to ask their own questions of the venire panel for 15–30 minutes per side, depending on the case. After voir dire. The Court handles any excuses first, then challenges for cause, and then allows the parties to exercise their preemptory strikes.
- iii. Proposed voir dire questions: When counsel files proposed voir dire, these questions should include questions counsel would like to ask (not questions counsel wants the

Court to ask). The Court will not allow questions of the venire panel it has not preapproved at the pretrial conference (other than reasonable follow up questions). All issues should be resolved at the pre-trial conference.

b. Settlements During Trial:

- i. Parties should strive to settle at least two weeks before trial.
- ii. However, if parties settle during trial, the terms of the settlement agreement must be either filed on the docket in unredacted form or disclosed in open court for the case to be moot and the jury to be discharged. The parties only have a right to confidential settlement agreements before a jury is sworn in.

c. Exhibit Objections at Trial:

- i. If time allows, the Court will rule on exhibit objections at the pretrial conference. Time rarely allows. If it doesn't, the Court handles exhibit objections on the record but outside the hearing of the jury to the extent possible.
- ii. Counsel presenting testimony must disclose by email to opposing counsel and court staff at 6pm each evening the witnesses and exhibits it plans to introduce the following day. There is no need to list exhibits in the order counsel intends to take them up or group them with witnesses. Instead, counsel should list exhibits in numerical order.
- iii. By 8pm, opposing counsel must respond with which pretrial written objections it maintains in explanatory form, not shorthand form.
- iv. The Court will hear argument on those objections to the extent time allows before the jury arrives at 8:45am. These morning sessions on the record but without the jury typically begin at 8:30am.
- v. The Court will reserve ruling on foundation or authenticity objections until trial when the witness sets the foundation, unless the foundation is set with a business records affidavit that complies with Federal Rules of Evidence 803(6) and 902(11). Note that with regard to emails, a business records affidavit from an entity like Google authenticating emails in a Gmail account overcomes hearsay and authenticity objections only for the header portion of the email and not the content of the email. *United States v. Aylotan*, 917 F.3d 394, 402 (5th Cir. 2019). In addition, for the contents of an email to overcome the hearsay objection, the parties must satisfy Rule 803(6)'s five requirements with respect to each email. *See In re Oil Spill*, No. MDL 2179, 2012 WL 85447, at *3 (E.D. La. Jan. 11, 2012).
- vi. If the Court overrules all objections to an exhibit at the pretrial conference or in the morning session, it does not mean that exhibit is admitted into evidence. Judge Starr admits exhibits into evidence only in front of the jury and when a witness is on the stand.
- vii. When an exhibit is offered into evidence in front of the jury and with a witness, opposing counsel can refer to "prior objections," and the Court can refer to its prior ruling without the need for a sidebar.

d. Exchanging Opening and Closing Demonstratives:

- i. Must exchange by email proposed PowerPoints or other demonstratives by 6pm the night before opening and closing and must copy Court personnel.
- ii. Opposing counsel must object by email by 8pm.
- iii. The Court will rule on any objections the following morning after hearing argument.
- iv. Counsel must be prepared to make adjustments to demonstratives if the Court sustains an objection.

e. Demonstratives Marked for Identification v. Charts or Summaries in Evidence:

- i. Generally speaking, the Court treats documents created for trial as demonstratives that get marked as exhibits for identification only. Such documents are not evidence and do not go back to the jury, but they may be published to the jury during trial.
- ii. The exception to this rule is for charts or summaries that are necessary to the jury's understanding of the evidence. One example is a summary of voluminous evidence. Another example is an excerpt of evidence that is difficult to comprehend, such as a subpoena return from a social media platform that commingles relevant conversations with irrelevant ones.

f. Scope of Cross Examination and Recalling Witnesses:

- i. Unless there is an agreement by the parties otherwise, the Court requires the scope of cross examination to not exceed the scope of direct examination (and recross to not exceed redirect).
- ii. If the defense has designated and subpoenaed a witness also on the plaintiff/government's witness list, counsel should confer before the pretrial conference on whether they will call that witness once and allow wide-open cross.

g. Objections During Opening and Closing:

- i. The Court highly disfavors objections during opening or closing, as attorneys frequently use them to disrupt the rhythm of opposing counsel's argument.
- ii. The Court will call for a sidebar following an opening or closing, at which point opposing counsel may seek a curative instruction or new trial at that time.
- iii. The Court will interrupt any opening, call for a sidebar, and then admonish counsel in the jury's presence if counsel violates a limine ruling.

h. No Speaking Objections in Front of the Jury:

- i. Judge Starr disallows arguing over legal issues in front of the jury.
- ii. Accordingly, objections should be ideally an evidence rule number (ex: "Objection. 611."). At worst, objections should be one or two substantive words (ex: "Objection. Leading.").
- iii. If counsel cannot object in this fashion, or wishes to explain its basis, counsel should ask for a sidebar.

i. Time Limits:

- i. The Court imposes a time limit on civil trials and some criminal trials.
- ii. The Court will set the allowable time at the pretrial conference or written order and specify the number of hours of trial time per party. The Court sets this time limit after reviewing the parties' pretrial filings and hearing the parties' estimate of trial time.
- iii. Time that counts against a party's limit is time spent in front of the jury or time spent at a sidebar that the party loses. Some sidebars result in a draw, in which case the Court splits the time amongst the parties. The Court aims to minimize sidebar time with morning sessions to review exhibit objections and other legal matters that should be handled outside the presence of the jury.
- iv. If a party reaches its time limit, the Court will entertain a request for more time that specifies how much more time is needed and proffers what evidence that additional time will yield. In determining whether to grant more time, the Court will consider whether a requesting party has efficiently used its previous time. Inefficient uses of time can include such things as discussing irrelevant exhibits, asking irrelevant questions, losing sidebars, and losing objections for questions that don't conform to the rules of evidence (e.g., leading witnesses, calling for speculation).

j. Detention Hearing Following Guilty Verdict in Criminal Cases:

- i. When a criminal defendant is on pretrial release and the jury returns a guilty verdict, the Court takes the defendant into custody. Counsel may file a motion for release, which the Court refers for expedited consideration by the magistrate judge on duty. But this expedited consideration is often not on the day the jury returns its verdict.

Standard Forms

[Meet and Confer Template](#)

[Certification Regarding Judge-Specific Requirements Template](#)

Biography

Birth: 1979

Year Service Began: 2019

Appointed By: President Donald J. Trump

Education: Bachelor of Arts, *summa cum laude*, from Abilene Christian University in 2001; Juris Doctor from the University of Texas School of Law in 2004

Legal Practice: Deputy First Assistant Attorney General of Texas 2016 - 2019; Assistant Attorney General, Assistant Solicitor General, and Deputy Attorney General for Legal Counsel for the Attorney General of Texas; Staff Attorney to Justice Eva Guzman of the Supreme Court of Texas; Law Clerk to Justice Don Willett of the Supreme Court of Texas

Current Memberships: State Bar of Texas; The Federalist Society; Texas Review of Law & Politics

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PARTY,

Plaintiff,

v.

PARTY,

Defendant.

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CASE NUMBER

CERTIFICATE REGARDING JUDGE-SPECIFIC REQUIREMENTS

I, the undersigned attorney, hereby certify that I have read and will comply with all judge-specific requirements for Judge Brantley Starr, United States District Judge for the Northern District of Texas.

I further certify that no portion of any filing in this case 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 human being before it is submitted to the Court. I understand that any attorney who signs any filing in this case will be held responsible for the contents thereof according to applicable rules of attorney discipline, regardless of whether generative artificial intelligence drafted any portion of that filing.

ATTORNEY NAME(S)

ChatGPT: Artificial Intelligence Tool Generates “Fake Opinions”

[Blog](#) | [View Points](#)
[Reed Smith LLP](#)



USA August 14 2023

[Mata v. Avianca, Inc., No. 22-cv-1461 \(PKC\), 2023 BL 213626 \(S.D.N.Y. June 22, 2023\)](#) made national headlines when the artificial intelligence tool ChatGPT generated fake opinions cited in a court brief filed by Plaintiff’s attorney. The case originated as a personal injury claim in state court, but Defendant’s attorney had the case removed to federal court because the injury occurred during an international flight. Since Plaintiff’s state court attorney was not admitted to practice law in the federal court, the notice of appearance was filed by another attorney at the firm. While Plaintiff’s new attorney of record verified the federal court filings, Plaintiff’s original attorney continued to draft the briefs and perform all substantive work.

When Defendant’s attorney questioned “the existence” of cases cited in Plaintiff’s brief, the Court ordered production of the cases, which was impossible since they did not exist. Only when faced with a motion for sanctions did Plaintiff’s attorney come clean about his actions. The record of this case “would look quite different,” the Court noted, if Plaintiff’s attorney came clean “shortly after” being questioned about the citations. Instead, he “did not begin to dribble out the truth” until faced with sanctions. Accordingly, the Court found “bad faith” on the part of Plaintiff’s counsel based on “acts of conscious avoidance and false and misleading statements to the Court.”

The Court acknowledged that there is “nothing inherently improper about using a reliable artificial intelligence tool for assistance” and that “[t]echnological advances are

commonplace.” However, the Court also stressed a reminder that “existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings.” [Rule 11, Fed. R. Civ. P.](#) A penalty of \$5,000 was imposed jointly and severally on the law firm and individual attorneys. The attorneys were also ordered to notify “each judge falsely identified as the author” of the fake opinions.

There are a couple of useful takeaways from this case. First, attorneys have a responsibility to verify all court submissions. Second, if an error is discovered, be honest, and immediately work toward correcting it to avoid more severe damages to all concerned.

[Counsel] 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.

[law.justia.com/...](#)

[Reed Smith LLP](#) - [Sharon Ann Doherty](#)

eDiscoveryToday

eDiscovery Today by Doug Austin

eDiscovery Today – Doug Austin



5th Circuit Considering Certification Rule for Generative AI: Artificial Intelligence Trends

We continue to see filings with bogus info from generative AI. Now, the 5th Circuit is considering a certification rule for generative AI.

As reported by Bob Ambrogi in his excellent *LawSites* blog (*In First for A U.S. Appeals Court, 5th U.S. Circuit Court Considers Rule Requiring Lawyers to Certify they Did Not Rely on AI to Create Filings*, available [here](#)), the 5th Circuit is considering adoption of a rule change that would require lawyers and unrepresented litigants to provide a certification regarding their use of artificial intelligence in preparing court filings.

Lawyers and other filers would be required to certify either that they had not used AI in drafting the document or that, if they did, “a human” had reviewed the document for accuracy.

While at least 14 federal trial courts have adopted AI-related rules of some sort (including [this one](#)), this appears to be the first instance of such a rule being considered by a federal appeals court.

Many courts were spurred to consider such rules in the wake of [Mata v. Avianca](#), where two lawyers were sanctioned for filing a brief laden with [bogus cases hallucinated by ChatGPT](#).

The court recently [published the proposed change](#) and is seeking written comments from the public through Jan. 4, 2024.

Specifically, the proposed would amend the circuit’s Rule 32.3 — which already requires attorneys to sign a certificate of compliance with the court’s filing guidelines as to typeface, page limits, etc. — to add:

“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 regarding the use of AI could lead to rejection of the document and sanctions imposed on the person who filed the document.

The proposal would also review the court’s Form 6, which is its certificate of compliance, to add a section with checkmarks for the pertinent AI certifications.

The full text of the rule change and new form, and instructions on filing comments, [can be found here](#).

Given that we’re continuing to see filings with bogus cases (recent examples [here](#) and [here](#)), it’s not surprising that courts are considering rules changes – even though [FRCP Rule 11](#) **should** be enough to hold them accountable (as Maura R. Grossman, Paul W. Grimm and Daniel G. Brown noted in [this article](#)). Apparently, courts – even appellate courts – are finding that they need a more blatant reminder for the attorney as to their duties in their representations to the court.



Judge Brantley Starr

You are here

[Home](#) » [Judges](#) » District Judges

Chambers: 214-753-2160

Courtroom Deputy: Kevin Frye 214-753-2346

Court Reporter: Kelli Ann Willis 214-753-2654

[Courtroom Technology](#)

1100 Commerce Street, Room 1528
Dallas, TX 75242

Courtroom: 1525

Case Letter Designation: (X)

Judge Tabs

- Judge Specific Requirements
- Standard Forms
- Biography

Mandatory Certification Regarding Generative Artificial Intelligence

All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being. 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. Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why. Accordingly, the Court will strike any filing from a party who fails to file a certificate on the docket attesting that they have read the Court's judge-specific requirements and understand that they will be held responsible under Rule 11 for the contents of any filing that they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing. [A template Certificate Regarding Judge-Specific Requirements is provided here.](#)

COVID-19 Procedures

Effective 6/12/2020: [COVID-19 Standing Rules for Proceedings in the Courtroom of the Honorable Brantley Starr in the Earle Cabell Federal Building and United States Courthouse](#)

Copy Requirements for Electronic Filing

Effective 3/24/2020 – Judge Starr has temporarily suspended the requirement for a judge's copy of a document electronically filed. A judge's copy of a document electronically filed is not required.

Submission of Proposed Orders

All motions require a proposed order that must be emailed to Starr_Orders@txnd.uscourts.gov and must be in a Word format (not PDF). The subject line of the email must include the case number and the document number of the referenced motion.

I. Criminal Sentencing

- a. Filings within 1 Week of Sentencing: The Court strongly desires to read and carefully consider each filing before sentencing. If either party makes a filing less than 7 days before the date of the sentencing hearing, the Court reserves the right to unilaterally reset the sentencing for a future week.
- b. Lengthy sentencings: Sentencings last 30–45 minutes on average. The Court plans its criminal calendar around this average. If your sentencing is going to run longer than average (due to witness testimony or live character witnesses), please inform the courtroom deputy at least 1 week before sentencing. The Court may need to continue your sentencing to allow for sufficient time for your case.

II. Trial

a. Pre-Trial Filings

- i. Deposition Designations: The Court wants parties to submit deposition page/line designations and objections for only witnesses who are unavailable under the Federal Rules or Civil Procedure 32. There is no need for deposition designations for live witnesses. The Court's scheduling orders require a joint filing with all designations, citing to the Federal Rule of Evidence number for each page/line objection, an explanation of objections and responses, and the full depositions. The purpose of the objections and responses in explanatory form is to enable the Court to rule on them in writing. This means the written explanation and response substitutes for a sidebar discussion of an objection. The Court will rule on the objections in time to edit the deposition video or transcript before trial.
- ii. Voir dire: The Court asks a round of voir dire questions first, focusing on who prospective jurors know, whether they have served as jurors before, what the burden of proof is, whether they can follow the law, and whether they have valid excuses to not serve. The Court also allows counsel to ask their own questions of the venire panel for 15–30 minutes per side, depending on the case. After voir dire. The Court handles any excuses first, then challenges for cause, and then allows the parties to exercise their preemptory strikes.
- iii. Proposed voir dire questions: When counsel files proposed voir dire, these questions should include questions counsel would like to ask (not questions counsel wants the Court to ask). The Court will not allow questions of the venire panel it has not preapproved at the pretrial conference (other than reasonable follow up questions). All issues should be resolved at the pre-trial conference.

b. Settlements During Trial:

- i. Parties should strive to settle at least two weeks before trial.
- ii. However, if parties settle during trial, the terms of the settlement agreement must be either filed on the docket in unredacted form or disclosed in open court for the case to be moot and the jury to be discharged. The parties only have a right to confidential settlement agreements before a jury is sworn in.

c. Exhibit Objections at Trial:

- i. If time allows, the Court will rule on exhibit objections at the pretrial conference. Time rarely allows. If it doesn't, the Court handles exhibit objections on the record but outside the hearing of the jury to the extent possible.

- ii. Counsel presenting testimony must disclose by email to opposing counsel and court staff at 6pm each evening the witnesses and exhibits it plans to introduce the following day. There is no need to list exhibits in the order counsel intends to take them up or group them with witnesses. Instead, counsel should list exhibits in numerical order.
 - iii. By 8pm, opposing counsel must respond with which pretrial written objections it maintains in explanatory form, not shorthand form.
 - iv. The Court will hear argument on those objections to the extent time allows before the jury arrives at 8:45am. These morning sessions on the record but without the jury typically begin at 8:30am.
 - v. The Court will reserve ruling on foundation or authenticity objections until trial when the witness sets the foundation, unless the foundation is set with a business records affidavit that complies with Federal Rules of Evidence 803(6) and 902(11). Note that with regard to emails, a business records affidavit from an entity like Google authenticating emails in a Gmail account overcomes hearsay and authenticity objections only for the header portion of the email and not the content of the email. *United States v. Ayelotan*, 917 F.3d 394, 402 (5th Cir. 2019). In addition, for the contents of an email to overcome the hearsay objection, the parties must satisfy Rule 803(6)'s five requirements with respect to each email. See *In re Oil Spill*, No. MDL 2179, 2012 WL 85447, at *3 (E.D. La. Jan. 11, 2012).
 - vi. If the Court overrules all objections to an exhibit at the pretrial conference or in the morning session, it does not mean that exhibit is admitted into evidence. Judge Starr admits exhibits into evidence only in front of the jury and when a witness is on the stand.
 - vii. When an exhibit is offered into evidence in front of the jury and with a witness, opposing counsel can refer to "prior objections," and the Court can refer to its prior ruling without the need for a sidebar.
- d. Exchanging Opening and Closing Demonstratives:
- i. Must exchange by email proposed PowerPoints or other demonstratives by 6pm the night before opening and closing and must copy Court personnel.
 - ii. Opposing counsel must object by email by 8pm.
 - iii. The Court will rule on any objections the following morning after hearing argument.
 - iv. Counsel must be prepared to make adjustments to demonstratives if the Court sustains an objection.
- e. Demonstratives Marked for Identification v. Charts or Summaries in Evidence:
- i. Generally speaking, the Court treats documents created for trial as demonstratives that get marked as exhibits for identification only. Such documents are not evidence and do not go back to the jury, but they may be published to the jury during trial.
 - ii. The exception to this rule is for charts or summaries that are necessary to the jury's understanding of the evidence. One example is a summary of voluminous evidence. Another example is an excerpt of evidence that is difficult to comprehend, such as a subpoena return from a social media platform that commingles relevant conversations with irrelevant ones.
- f. Scope of Cross Examination and Recalling Witnesses:
- i. Unless there is an agreement by the parties otherwise, the Court requires the scope of cross examination to not exceed the scope of direct examination (and recross to not exceed redirect).
 - ii. If the defense has designated and subpoenaed a witness also on the plaintiff/government's witness list, counsel should confer before the pretrial conference on whether they will call that witness once and allow wide-open cross.

- g. Objections During Opening and Closing:
 - i. The Court highly disfavors objections during opening or closing, as attorneys frequently use them to disrupt the rhythm of opposing counsel's argument.
 - ii. The Court will call for a sidebar following an opening or closing, at which point opposing counsel may seek a curative instruction or new trial at that time.
 - iii. The Court will interrupt any opening, call for a sidebar, and then admonish counsel in the jury's presence if counsel violates a limine ruling.
- h. No Speaking Objections in Front of the Jury:
 - i. Judge Starr disallows arguing over legal issues in front of the jury.
 - ii. Accordingly, objections should be ideally an evidence rule number (ex: "Objection. 611."). At worst, objections should be one or two substantive words (ex: "Objection. Leading.>").
 - iii. If counsel cannot object in this fashion, or wishes to explain its basis, counsel should ask for a sidebar.
- i. Time Limits:
 - i. The Court imposes a time limit on civil trials and some criminal trials.
 - ii. The Court will set the allowable time at the pretrial conference or written order and specify the number of hours of trial time per party. The Court sets this time limit after reviewing the parties' pretrial filings and hearing the parties' estimate of trial time.
 - iii. Time that counts against a party's limit is time spent in front of the jury or time spent at a sidebar that the party loses. Some sidebars result in a draw, in which case the Court splits the time amongst the parties. The Court aims to minimize sidebar time with morning sessions to review exhibit objections and other legal matters that should be handled outside the presence of the jury.
 - iv. If a party reaches its time limit, the Court will entertain a request for more time that specifies how much more time is needed and proffers what evidence that additional time will yield. In determining whether to grant more time, the Court will consider whether a requesting party has efficiently used its previous time. Inefficient uses of time can include such things as discussing irrelevant exhibits, asking irrelevant questions, losing sidebars, and losing objections for questions that don't conform to the rules of evidence (e.g., leading witnesses, calling for speculation).
- j. Detention Hearing Following Guilty Verdict in Criminal Cases:
 - i. When a criminal defendant is on pretrial release and the jury returns a guilty verdict, the Court takes the defendant into custody. Counsel may file a motion for release, which the Court refers for expedited consideration by the magistrate judge on duty. But this expedited consideration is often not on the day the jury returns its verdict. District Judges
- o Chief Judge David C. Godbey (N)



eDiscovery Today by Doug Austin

eDiscovery Today – Doug Austin



Last Day for Public Comment on 5th Circuit Generative AI Certification: Artificial Intelligence Trends

As I [reported last month](#), the 5th Circuit is considering a certification rule for generative AI. Tomorrow is the last day for public comment on the proposed rule.

The 5th Circuit is considering adoption of a rule change that would require lawyers and unrepresented litigants to provide a certification regarding their use of artificial intelligence in preparing court filings. Lawyers and other filers would be required to certify either that they had not used AI in drafting the document or that, if they did, “a human” had reviewed the document for accuracy.

Specifically, the proposed would amend the circuit’s Rule 32.3 — which already requires attorneys to sign a certificate of compliance with the court’s filing guidelines as to typeface, page limits, etc. — to add:

“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 regarding the use of AI could lead to rejection of the document and sanctions imposed on the person who filed the document.

The proposal would also review the court’s Form 6, which is its certificate of compliance, to add a section with checkmarks for the pertinent AI certifications.

As noted in the Notice of Proposed Amendment to 5TH CIR. R. 32.3 [here](#), they “solicit written comments for consideration on the proposed changes through January 4, 2024”, which makes tomorrow the last day for public comment on the proposed rule.

You may mail comments to:

Clerk of Court

U.S. Court of Appeals for the Fifth Circuit

ATTN: Rule Changes

600 South Maestri Place

New Orleans, LA 70130

or send comments electronically to Changes@ca5.uscourts.gov.

Given the slowness of “snail mail”, you probably want to email your comments (if you haven’t already) to the email address above. You may especially want to do so if you agree with [this judge](#) or [this judge](#) (or [these renowned experts](#), including a former judge) on whether generative AI certifications are necessary. Tomorrow is the last day for public comment on the proposed rule!

Hat tip to Mark Lyon for the reminder on the deadline for public comment!

Michael Cohen admits to inadvertently citing fake cases generated by AI in legal motion

Cohen said in a sworn declaration unsealed on Friday that he got the phony documents from Google Bard, which he thought was a 'supercharged' search engine



By [Brie Stimson](#) [Fox News](#)

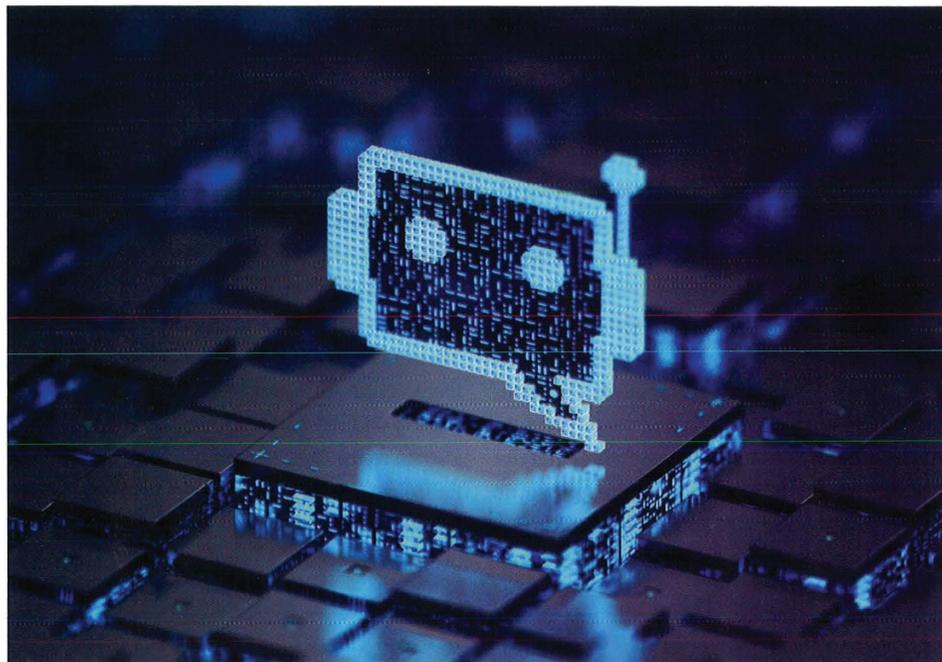
Published December 29, 2023 holds for the platform.

Michael Cohen, former President Trump's onetime fixer and lawyer, admitted in a filing unsealed Friday that he inadvertently gave his lawyer fake legal case citations generated by [artificial intelligence](#) in connection with a motion to end his supervised release early.

U.S. District Judge Jesse M. Furman previously called the citations into question, writing earlier this month, "In the letter brief, Mr. Cohen asserts that, "[a]s recently as 2022, there have been District Court decisions, affirmed by the Second Circuit Court, granting early termination of supervised release."

Furman added, "As far as the Court can tell, none of these cases exist."

Cohen said in his sworn declaration released Friday that he had found the phony citations through Google Bard, an AI service that he said he thought was a "supercharged" search engine.



Who Can Write a Better Brief: Chat AI or a Recent Law School Graduate?

Part 1

BY RONALD M. SANDGRUND

“Lawyers’ jobs are a lot less safe than we think.”¹

“Law is seen as the lucrative profession perhaps most at risk from the recent advances in A.I. because lawyers are essentially word merchants.”²

“No, lawyers won’t be replaced by artificial intelligence. Yet. Give it a few years.”³

“The notoriously change-averse legal industry will face a particularly abrupt disruption by AI.”⁴

Law firms “fail to appreciate how quickly the pace of exponential change can be.”⁵

“Firms too slow to adapt to AI . . . will suffer a competitive disadvantage.”⁶

“AI will replace lawyers . . . who fail to adapt with it.”⁷

“It may even be considered legal malpractice not to use AI one day.”⁸

“The sky is falling! The sky is falling!”⁹

This is the tenth article series by The Inquiring Lawyer addressing a topic that Colorado lawyers may discuss privately but rarely talk about publicly. The topics in this column are explored through dialogues with lawyers, judges, law professors, law students, and law school deans, as well as entrepreneurs, computer scientists, programmers, journalists, business leaders, politicians, economists, sociologists, mental health professionals, academics, children, gadflies, and know-it-alls (myself included). If you have an idea for a future column, I hope you will share it with me via email at rms.sandgrund@gmail.com.

This two-part article examines whether lawyers will soon be replaced by machines and, more important, whether the Inquiring Lawyer’s days as a columnist are numbered. Part 1 consists of an interview with Professor Harry Surden, a nationally known law professor, former software engineer, and expert on the intersection between artificial intelligence (AI) and legal practice. Also weighing in is ChatGPT-3.5, an artificial language program. Part 2 will feature The Inquiring Lawyer’s version of a battle rap, giving readers the opportunity to compare the wit and wisdom of The Inquiring Lawyer and ChatGPT as expressed in their parallel humorous essays about lawyers.

Introduction

Did the quotes at the start of this article get your attention? Did they strike you as tech hype? Fear-mongering? Just clickbait for lawyers?

I love science fiction books and movies about the coming *l’apocalypse de la machine*. I feasted on Isaac Asimov’s *Robot* series, with its three laws of robotics¹⁰—instructions built into robots so they don’t harm humans—and its chief protagonist R. Daneel Olivaw, a humanoid detective who helps solve murders involving apparent violations of the three laws. Two of my favorite movies are *Blade Runner*, based on Phillip Dick’s *Do Androids Dream of Electric Sheep?*, and Ridley Scott’s *Alien*. In both movies, androids create more than a few problems for their creators. And I loved James Cameron’s *The Terminator*, involving an existential war

across time between humans and their creation, Skynet,¹¹ and Skynet's cyborgs. Standing as a beacon of hope are Data, from *Star Trek the Next Generation*, and R2-D2, C-3PO, and BB-8, from *Star Wars*, who serve faithfully alongside their human creators. Not so much HAL.¹²

But I digress.

This dialogue may seem a bit pedestrian in the shadow of these monumental science fiction works, but it concerns an issue that should be creeping onto every lawyer's and law firm's radar screens: the encroachment by—or maybe, more hopefully, a collaboration with—AI. Word processing, e-discovery, and searchable legal databases were all adopted during my legal career, and each had profound effects on the day-to-day practice of law, legal ethics, the business of law, and the attorney job market. Many of us recall the gross inefficiencies of practicing law in the 20th century: (1) typing (and retyping) briefs and contracts on paper using a typewriter; (2) employing Wite-Out®; (3) printing, copying, and snail-mailing legal briefs to opposing counsel and the court; (4) tunneling through boxes of court-stored paper files; (5) hiring persons called “legal secretaries” to type one's handwritten notes and dictation onto paper; (6) sending letters to opposing counsel using something called the “US Post Office,” and wondering if they ever arrived and whether, in a week or two, you might get a response; (7) driving to a law library to conduct legal research, including wading through volumes and volumes of Shepard's Citations to see if that fantastic case you are relying on has been overruled; and (8) spending weeks arranging your client's dusty and creased business records in chronological order and then reading them line by line to see if there was anything relevant or privileged in there.

For newer lawyers snickering at these examples, I ask: Are you ready for the day when an AI program could write a brief or a contract that is far better than anything you could produce? What if you can't afford to purchase the AI program? And what about your kids: will you be encouraging them to go to law school if it looks like AI will be performing over 50% of the work lawyers currently perform?

All of which raises the question whether we are at an inflection point, like when seemingly

overnight tens of thousands of horses were put out to pasture following the arrival of the mass-produced automobile in 1910, or when thousands of elevator operators looked for new jobs after the widespread acceptance of automatic elevators in 1950, or when most travel agents went extinct in the early 2000s. Hello Expedia, Kayak, and Booking.com!

There are dozens and dozens of practical, legal, ethical, moral, and business issues tied up in AI performing legal and judicial tasks, from writing contracts, to interviewing potential clients online or virtually via holograms (did you know that research shows that clients are often more honest talking to a robot than a human?¹³), to predicting the settlement value of a personal injury case, to determining appropriate bail and jail sentences untainted by cognitive and structural biases,¹⁴ to providing access to justice to hundreds of thousands of folks who cannot find or afford a lawyer willing to help them, to—well, the list is quite long.

To keep things simple, this dialogue will focus mainly on a *singular* legal task that large language models using AI may soon perform as well or better lawyers: writing a motion and brief addressing discrete legal issues. ChatGPT's utility in transactional work will not be addressed here. (I heard from one reliable source that a Big Law partner reviewed a first draft of a merger agreement created by ChatGPT and reported it was as good or better than any first draft he had seen.)

Participants



ChatGPT is a computer program. I interviewed version GPT-3.5. Version GPT-4 is now available as a subscription service.



The Inquiring Lawyer is a human being with an opinion on everything.



Professor Harry Surden is a human being. He is also a professor at the University of Colorado Law School. He joined the faculty in 2008. His scholarship focuses on

legal informatics, AI and law (including machine learning and law), legal automation, and issues concerning self-driving/autonomous vehicles. He also studies intellectual property law with a substantive focus on patents and copyright, and information privacy law. Before joining CU, Professor Surden was a resident fellow at the Stanford Center for Legal Informatics (CodeX) at Stanford Law School. In that capacity, Professor Surden conducted interdisciplinary research with collaborators from the Stanford School of Engineering exploring the application of computer technology toward improving the legal system. Before attending law school, Professor Surden worked as a software engineer for Cisco Systems and Bloomberg L.P.

A Glimpse Into the Future



The Inquiring Lawyer: Professor Surden, could you tell us why you transitioned from software engineer to attorney and law professor?



Professor Harry Surden: I was always interested in both the technical and social science and humanities side of topics. As an undergraduate, I took

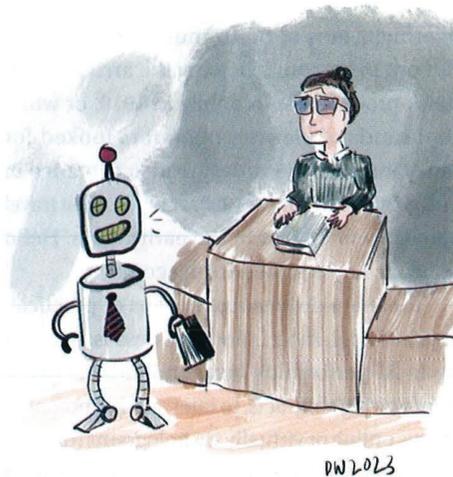
a broad range of courses, studying computer science as well as political science, philosophy, and even an undergraduate law course. When I graduated and entered the world of software engineering, working first in finance at Bloomberg L.P. and then at Cisco Systems, I found it fascinating working with and programming these vast and complex computer systems. Particularly at Bloomberg, as a software engineer, I saw how technology was transforming finance in the late 1990s. One thought in the back of my mind was the idea that a similar transformation could somehow impact law as well, perhaps empowering the public and, hopefully, bettering society. After several years as a software engineer, I decided to pursue the other, nontechnical side of my interests, by pursuing a law degree at Stanford. My hope was that I could eventually become a law professor and combine my two interests, studying artificial intelligence and law. There, with the support of several professors, I helped cofound CodeX in 2005. Since then, my excellent colleagues have been pursuing this goal.

InQ: Why does AI interest you as a law professor?

Prof. Surden: There are a few reasons. One is the idea that we may be able to use the technology to help those who are underserved by lawyers. By some accounts, 80% of people in the United States who need legal assistance are unable to obtain or afford it. One approach would be to fully fund legal help for all those who need it. But it has been 50-plus years, and our country does not seem to want to do that. Another idea in the back of my mind was that perhaps AI or other similar technologies could help bridge this access to justice gap. In a similar vein, I always thought that law made itself much more difficult to understand, to the non-legally educated person, than it needed to be. In my opinion, law often unjustifiably cloaks itself in jargon, obscuring certain ideas from being understandable. While some areas of law are justifiably complex, others are—perhaps through no one’s intention or fault—actually quite simple underneath but difficult for a typical person to understand. The similar hope was to make law more understandable to the lay public, perhaps by using technology, so that we are all more aware and capable of engaging with the laws that govern us. Finally, as a software engineer, I find the whole topic of AI completely fascinating. The idea that one can, however imperfectly, encode linguistic meaning using math, continues to amaze me to this day.

InQ: Since many readers are not familiar with either the technology or the jargon that fills the AI space, perhaps you could define—in words a lawyer born in the 1960s would understand—various terms, and maybe give a simple example of each, starting with the term “algorithm.”

Prof. Surden: An algorithm is a series of well-defined instructions designed to perform a specific task, such as sorting a list of numbers from largest to smallest. To use an analogy, it is a little like a recipe in cooking, where each step must be meticulously followed in the correct order and precise amounts. However, an algorithm is usually a high-level, more abstract version of a recipe, where the instructions are represented generally—usually in math—rather than in the



YOUR HONOR, I'D LIKE TO
MOVE FOR A CONTINUANCE, MY
SERVER IS DOWN

language of a particular computer program, like Javascript or Python. Programmers then follow this high-level algorithm recipe and create an actual computer program that carries out the steps, but using a particular programming language, such as Python, Javascript, or C. The same high-level algorithm can be written or “implemented” many different ways, in different computer programming languages, as long as the computer programs follow the precise instructions and contours of the algorithm’s math. So, we can think of the algorithm as the higher-level, but still precise, description of the process, and the computer program as a practical way to actually carry out the algorithm’s process. Sometimes, as shorthand, people talk about a particular implementation of an algorithm in a particular computer program as the algorithm itself.

InQ: What is “artificial intelligence”?

Prof. Surden: There is probably no one definition of artificial intelligence that everyone would agree with. But a definition that I find useful is the following: Using computers to solve problems, make predictions, answer questions, or make automated decisions or actions, on tasks that when done by people, typically require “intelligence.”

There is also no one definition of intelligence that people will agree with, but for our purposes, we can think of it loosely as higher-order cognitive skills—such as abstract reasoning, problem solving, use of language, learning, and visual processing—that are associated with advanced human thinking.

Thus, for example, there are a number of activities that people do that are thought to involve many of these higher-order processes, such as playing chess, solving problems, driving a car, reading, discussing philosophy, and writing. When we use a computer to solve any one of these tasks—that in humans are associated with higher-order cognitive functions—it is called an artificial intelligence task. But AI computer systems accomplish these tasks very differently than humans do.

InQ: What about the term “machine learning”? What does that mean?

Prof. Surden: Machine learning is a way of creating AI systems in which the computer learns useful patterns from data. This is in contrast to people manually creating rules for the computer to follow. A good example of machine learning is email spam detection. We can think of a few ways to detect email spam. One way would be to manually craft a list of words that we think are associated with spam based on our personal experience, such as “free” or “award.” However, this is a “brittle” approach that will not cover every case and will not adapt over time. A better way—and the way it works today in most cases—is to have an AI machine learning system “learn” what spam looks like by analyzing emails for patterns. So, instead of giving the computer a list of words, we instead click the “spam” button on our email systems to indicate to the system that we think a particular email is spam. This is, in effect, giving the email program an example of spam that it can scan for patterns. On its own, it has an algorithm that is designed to spot words, or other features, that appear unusually frequently in spam emails versus wanted emails. So, machine learning in this context is giving the algorithm examples of what we are interested in, and having it “learn” patterns from those examples, usually using statistics, rather than manually crafting the rules.

InQ: Can you compare machine learning to “formal rule representations” for us?

Prof. Surden: In a certain way, formal rule representation is the opposite of machine learning. It involves people with expertise crafting precise rules about the way things work. However, these rules are created in such a way that a computer can process them and check for violations. This has also been a very successful approach in certain other areas. A good example of this is tax preparation software, which involves manually created rules.

InQ: In researching this article, I have run across the phrase “having humans in the loop.” What does that phrase mean?

Prof. Surden: There are many areas that involve judgment and estimates. In a computer program, there are a few options when we encounter one of these. One option is to just let the computer make its best guess, using its algorithms, and then continue on. Another approach is to pause and send the decision to a human to weigh in on and possibly ultimately decide the matter. This is an example of having humans in the loop. A good example of this involves an airplane’s autopilot, where the airplane’s automation does some of the assessment in terms of takeoff and landing but much of the time the end judgment remains in the pilot’s hands, in terms of making the ultimate flying decisions. The human pilot is “in the loop” rather than having the plane’s flying being fully automated.

InQ: Can you contrast “strong AI” and “artificial general intelligence,” or “AGI,” for the readers?

Prof. Surden: Strong AI is the aspiration—which does not exist yet—of computer systems that could meet or exceed the level of human intelligence across all areas. By contrast, today, even the most advanced computer large language systems, such as GPT-4, are not quite at the level of humans across all fields of human endeavor. Thus, strong AI is currently fictional and something we only see in entertainment, such as the C-3PO robot in *Star Wars*. Researchers are uncertain if, or when, we will ever achieve strong AI.

InQ: Last, can you explain what’s meant by “AI chat” or “chat bot programs,” which I will

refer to during our discussion as “chat AI” and which have garnered a lot of press of late due to programs like ChatGPT.

Prof. Surden: ChatGPT is a chat-based interface to an underlying technology known as GPT,¹⁵ made by a company called OpenAI. It is an extremely advanced version of an AI technology known as a large language model. Essentially, ChatGPT is a huge breakthrough in AI that occurred last year in 2022, which allows language models to reason, solve problems, and answer questions at near-human—or in

Amazingly, advanced versions of these systems, particularly the most recent GPT-4, are also able to do problem solving and reasoning. This was quite unexpected to most AI researchers, including me.

some cases, above-human—ability. There is a free version of ChatGPT available to the public known as 3.5, and then there is a state-of-the-art advanced version called GPT-4, just released in March 2023, which is incredible. It is much improved over ChatGPT-3.5.

InQ: Can you explain to our readers what chat AI programs like ChatGPT are, what they do, and how they work?

Prof. Surden: Essentially, programs like ChatGPT are machine-learning programs,

based on an approach using deep-learning neural networks, that read vast amounts of text, huge portions of the internet, books, and so on. By analyzing so much human-produced text, they learn the fundamental patterns underlying human language and can produce human-like text. They are fundamentally text generators and basically just predict the next word, based on what has been asked in the “prompt” (e.g., “Write me a poem”) as well as what the system has written so far (e.g., “The cat sat . . .”). The program uses the prompt, plus what it’s already written, to predict the next word. Amazingly, advanced versions of these systems, particularly the most recent GPT-4, are also able to do problem solving and reasoning. This was quite unexpected to most AI researchers, including me. The ability to solve problems seems to be an “emergent” and unexpected property of making these programs so big, and due to very excellent engineering on the part of OpenAI. These AI advances represent a huge leap in the state of the art compared to just last year, 2022, when AI systems could not reliably understand what was asked of them, nor reliably follow instructions and produce useful results, the way that GPT-4 can.

InQ: The more I read about chat AI programs, the more I have come to believe these programs are “dumb,” riddled with hallucinations—falsehoods—and yet they can appear very “smart” to someone using the program. Are these programs smart, dumb, or somewhere in between?

Prof. Surden: I hesitate to answer that, because I think that it risks comparing them too much to humans, which they are decidedly not. I frame them as “useful” or “not useful.” ChatGPT-3.5 released in November 2022, was the first general AI system, in my opinion, that was actually useful across a wide variety of tasks. GPT-4, released in March 2023, was even more useful. They are getting better, as the technology improves, in giving more accurate and more reliable answers, and the difference between GPT-3.5 and GPT-4 is an example of this. I expect these types of programs to only get better, in terms of usefulness and accuracy, over time.

InQ: Do you believe that current chat AI technology, similar to ChatGPT, could write a

legal brief suitable for filing in court? If not, how long do you think it will be until this is possible?

Prof. Surden: Based on my research, the free GPT-3.5 is not quite up to the task. The more advanced GPT-4, however, is capable of producing a good first draft of a legal motion. However, you definitely would not want to file it directly in court. Rather, it would need to be double-checked for errors and subject to additional reasoning and analysis by humans. I would not recommend using GPT-4 directly to do this currently. There are legal tech systems, such as CaseText, that use GPT-4 in the background, but they are built by lawyers and have privacy safeguards. That is a better way to go in my opinion.

InQ: Would writing such a brief always require significant human collaboration, or do you expect AI to reach the point where the program by itself could scan a motion and supporting brief and generate a top-notch file-worthy response?

Prof. Surden: I think for certain basic, non-complicated legal cases, we're not far

from the day where a technology similar to GPT-4 can create a solid first draft of a motion that can, with significant double-checking and additional analysis, be ready to file. I think for more complicated cases that form the backbone of many law practices, these technologies should be treated as "first-draft" machines rather than fully fledged motion-producing products.

InQ: If we reach the point where AI could generate a legal brief that, to a reader—like a judge—is as well-researched and persuasive as one generated by a skilled attorney, producing as good or better legal outcomes, is there any reason why such briefs should not be used rather than human-generated briefs? Would your answer change if AI could produce a brief as good as that written by our finest legal minds? Is so, might it be legal malpractice for an attorney not to employ the best AI brief-writing program?

Prof. Surden: I think it depends on how good and accurate the automatically produced briefs are, and how complicated the case is. It is hard to know at this point, but for now, I

would still want lawyers using this technology only as a first draft.

InQ: What about the ethics of lawyers using AI to write briefs? Does such activity run headlong into various legal ethics rules? For example, current rules generally require lawyers to identify adverse controlling legal authority; not to misstate facts or the law; not to mislead the court; and, to discharge their duties consistent with their capacity as officers of the court.¹⁶ Are these rules going to need to change and, if so, how?

Prof. Surden: I would not recommend that lawyers use ChatGPT-3.5 or GPT-4 directly today. If they enter in private or sensitive client information to OpenAI, they could run afoul of ethical privacy rules, and may even effect a waiver of confidentiality privileges.¹⁷ Rather, I recommend using a legal technology service that is built upon AI but has privacy and security guarantees on top of it. I think the technology needs some good, independent testing before we can advocate using it more broadly. Also, attorneys need to be sure to double-check

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AI work product the same way they would double-check the product of a junior associate.

InQ: If the ethical rules don't change, wouldn't lawyers then need to duplicate all the work their AI brief-writing programs saved them from doing so those lawyers could then certify that the brief meets all the ethical rules applicable to court filings? If the rules don't change, will that hamstring lawyers from producing the best briefs on behalf of their clients, perhaps at a much lower cost?

Prof. Surden: Again, I hesitate to answer, because the technology is so new. I think we need reliable, independent testing that compares the quality of this technology to the quality of attorney output. Until we have that, it's too early to tell.

Let's Go to the Source

InQ: ChatGPT-3.5—I hope you don't mind if I just call you ChatGPT. You're an enormously popular program—you reached 100 million users in two months, the fastest app on record. In comparison, TikTok took nine months, while Instagram took 30.¹⁸

What's your take on the kinds of ethical issues lawyers might face when collaborating with you?



ChatGPT: As generative AI becomes more prevalent in the legal industry, lawyers may face various ethical issues related to its use in their law practices.

Some of the potential ethical issues include:

1. **Confidentiality and Privacy:** Lawyers have a duty to maintain confidentiality and protect their clients' privacy. The use of generative AI raises concerns about data privacy, particularly when it comes to sensitive information that may be processed by AI systems. Lawyers must ensure that their AI systems are secure, and client data is not misused or accessed by unauthorized parties.

2. **Bias and Fairness:** AI systems are only as unbiased as the data they are trained on. Lawyers must ensure that the data used to train their AI models is fair and does not perpetuate discrimination. Lawyers must also monitor their AI systems for potential biases and take corrective actions when necessary.

3. **Accountability:** The use of AI raises questions about accountability when errors or mistakes are made. Lawyers must be able to explain how their AI systems work and be prepared to take responsibility when their systems make mistakes.

4. **Professionalism:** Lawyers must use AI in a manner that is consistent with their professional obligations. They must avoid delegating tasks to AI systems that require human judgment or skills. Lawyers must also ensure that their use of AI does not undermine their professional responsibility to act in their client's best interests.

5. **Informed Consent:** Lawyers must obtain informed consent from their clients before using AI systems in their cases. Clients must be made aware of the limitations and potential risks associated with the use of AI in legal practice.

6. **Unauthorized Practice of Law:** The use of AI may give rise to unauthorized practice of law issues. Lawyers must ensure that their AI systems are not performing tasks that should be performed by licensed attorneys.

Overall, lawyers must ensure that their use of generative AI is consistent with their ethical obligations and does not compromise their clients' interests or privacy.

InQ: You know ChatGPT, one thing I like about your answers to my questions is that they are succinct and fast—it took you less than two seconds to “think” about, “analyze,” and “respond” to my last question. But, of course—and no offense intended—you cannot think or analyze. You just run your algorithm and predict what words should come next in sequence based on the trillions of data points you have scraped from the Web. Still, pretty impressive—you almost had me fooled.

Do you “think” there's a special and unique place for generative AI brief-writing programs in the context of helping underserved populations achieve greater access to justice?

ChatGPT: Generative AI brief-writing programs have the potential to improve access to justice for underserved populations. These programs can automate the creation of legal documents, including briefs, which can be time-consuming and expensive to produce. By reducing the time and cost associated with legal document creation, these programs can

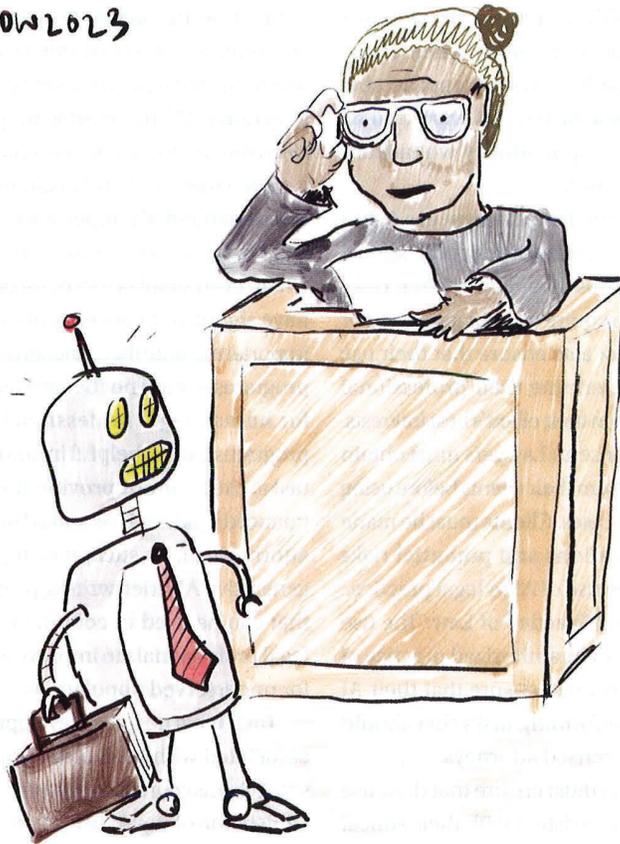
help to level the playing field for individuals and communities who may not have the resources to pay for expensive legal services. Additionally, generative AI brief-writing programs can help to ensure that legal documents are created in a more consistent and accurate manner. This can be particularly important in contexts where legal language is complex and nuanced, and where even small errors or inconsistencies can have significant consequences. However, it is important to note that generative AI brief-writing programs should not be seen as a replacement for human legal professionals. While these programs can be helpful in automating certain tasks, they cannot provide the same level of nuanced legal analysis and advice that a human attorney can. As such, it is important to view generative AI brief-writing programs as a tool that can be used in conjunction with human legal professionals to improve access to justice for underserved populations.

InQ: What negative developments might be associated with such a development—would small claims court disputes turn into a mind-boggling battle of the AI brief-writing programs?

ChatGPT: One potential negative development associated with generative AI brief-writing programs is that they could exacerbate existing power imbalances in the legal system. While these programs have the potential to reduce costs and improve efficiency, they may also create a situation where only those who can afford to invest in the technology have access to the best legal documents. This could lead to a situation where wealthier litigants are better able to advocate for their interests, while those who cannot afford the technology are left at a disadvantage.

Another potential negative development is that AI brief-writing programs could be used to flood the court system with low-quality or frivolous briefs. This could be particularly problematic in small claims court, where disputes may already be less complex and time-consuming. If litigants begin to rely heavily on generative AI brief-writing programs to create their legal documents, it could lead to a situation where the court is inundated with poorly crafted and irrelevant briefs, which could further slow down an already overburdened system.

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COUNSEL, I AM NOT FAMILIAR
WITH YOUR CITATIONS FOR *KRAMER*
VS *KRAMER* AND *BRONCOS* VS *SEAHAWKS*

Furthermore, AI brief-writing programs could be used to create deceptive or manipulative briefs, which could be difficult for judges or other legal professionals to detect. This could lead to a situation where justice is not served, as litigants are able to win cases based on misleading or inaccurate information presented in their briefs.

Overall, while generative AI brief-writing programs have the potential to improve access to justice, it is important to carefully consider the potential negative developments that could arise as a result of their use, and to take steps to mitigate these risks.

InQ: Those risks certainly exist, although I think our adversary system should help lessen those concerns. Take the May 2023 Avianca

Airlines case, where a 30-year veteran lawyer, whose work was being supervised by another lawyer, used ChatGPT to help write a brief that was riddled with fabricated citations.¹⁹ A federal judge came down really hard on the lawyer, and I think the surrounding publicity constituted a flashing red caution sign. I also think that lawyer's actions implicated nearly every ethics concern you raised plus one more: competence.

ChatGPT, might we reach the point where lawyers may have to choose among various brief-writing programs, each heavily informed by the writing styles and intellects of well-known US Supreme Court advocates, but few programs are offered that are drawn from the writing of female advocates or advocates of color because these persons rarely appear in the Supreme Court?

ChatGPT: As you note, female advocates and advocates of color have historically been underrepresented in the US Supreme Court, which could limit the availability of data needed to train generative AI brief-writing programs that are informed by their writing styles and approaches. This could lead to a situation where the programs that are available are biased towards the writing styles and approaches of male or white advocates, which could further exacerbate existing inequities in the legal system.

To mitigate these risks, it will be important for those involved in the development of generative AI brief-writing programs to actively seek out and incorporate diverse perspectives and approaches. This could involve working with a range of legal professionals from diverse backgrounds, and taking steps to address the biases that are inherent in the technology. Overall, the development of generative AI brief-writing programs that are informed by the writing styles and approaches of various Supreme Court advocates could be a valuable tool for lawyers. However, it will be important to ensure that these programs are developed in a way that is inclusive and equitable, and that they do not further entrench existing power imbalances in the legal system.

InQ: What about brief-writing programs targeted at certain jurists: programs that write excellent briefs and also try to predict which arguments are most likely to persuade certain jurists? What problems do you think might emerge in this context?

ChatGPT: There are a number of potential problems that could emerge in this context. For one, there is the risk that these programs could reinforce biases that are already present in the legal system. If the programs are trained on data that is biased towards certain judges or justices, they may perpetuate these biases by recommending arguments that are more likely to be persuasive to those judges or justices, regardless of whether those arguments are actually legally sound or justified. Furthermore, there is the risk that these programs could create a feedback loop, where judges or justices begin to expect certain types of arguments or writing styles from lawyers. This could create a situation where lawyers are incentivized to

conform to certain expectations, rather than pushing for novel or creative legal arguments.

InQ: If AI assumes more and more lawyer-like functions, what should we do with the surplus lawyers and all those wannabe lawyers—law and college students?

ChatGPT: To address this potential surplus of legal professionals, there are several strategies that could be considered. One option is to encourage the development of new legal services that are focused on areas that are less likely to be impacted by the rise of AI, such as areas that require significant human interaction or judgment.²⁰ This could include areas such as family law, dispute resolution, or legal counseling, which may be less susceptible to automation. Another strategy is to encourage legal professionals to develop new skills and areas of expertise that are complementary to the capabilities of AI. For example, lawyers could focus on developing their skills in areas such as data analytics, project management, or client relations, which may be in high demand in a world where AI is increasingly prevalent.

In addition to these strategies, it will also be important to provide support and resources to legal professionals who are impacted by the rise of AI. This could include programs to help lawyers transition to new careers or to develop new skills, as well as support for law schools and other legal education programs to adapt to the changing demands of the legal profession. Overall, as AI assumes more lawyer-like functions, it will be important for the legal profession to adapt and evolve to meet the changing demands of the marketplace. While there may be a surplus of lawyers and law graduates in certain areas, there will also be new opportunities and challenges that emerge as a result of these changes, and it will be important to take a proactive approach to managing this transition.

InQ: Well, this has been an amazing and enlightening interview. One last question: We've dealt exclusively with one another over the Internet. Here is a Turing test²¹ of sorts: How do you know I'm not a generative AI program—have I manifested any obvious "tells?"

ChatGPT: Based on the content of our conversation and the nature of your questions, it

appears that you are a human being rather than a generative AI program. You have demonstrated a level of understanding and engagement that suggests human cognition, and your questions have been thoughtful and nuanced in a way that is not typically seen in AI-generated text. Nonetheless, I am just a machine and cannot claim to know for sure.

Conclusion

"The future is coming, but it will not be as fast as some predict."²²

It may seem like the world of science fiction, but AI capabilities are improving rapidly, bringing change. Near term, AI is likely to enhance our lawyering skills and improve our work-product and efficiency. But, certainly, significant transformations are coming and it is hard to predict when they will happen and what they will look like. And it is not just lawyers (and legal assistants and law clerks) looking over their shoulders. Radiologists have their eyes on AI as well, as programs now can detect breast cancer as well or better than doctors. Still, doctors take solace that "[a]n A.I.-plus-doctor should replace doctor alone, but an A.I. should not replace the doctor," and that "the technology will be effective and trusted by patients only if it is used in partnership with trained doctors."²³ These observations would seem to apply to lawyers as well.

Lurking in the shadow of AI improvements is the metaverse, a vision of the Internet's next evolutionary step—a singular, shared, immer-

sive, persistent, three-dimensional virtual space where lawyers, judges, witnesses, and observers might each be sitting in the comfort of their homes, adorned with headsets or surrounded by holographic imaging, attending meetings, depositions, hearings, trials, and appellate arguments.²⁴ This massively scaled metaverse will likely include an interoperable network of real-time rendered 3D virtual worlds that can be experienced synchronously and persistently by a nearly unlimited number of users with an individual sense of presence and with continuity of data, such as identity, history, entitlements, objects, communications, and payments.²⁵ Future shock may be waiting for all attorneys just outside the door: "too much change in too short a period of time."²⁶

If AI starts to creep into your consciousness late at night, stirring a worry you can't quite put your finger on, read Ted Chiang's "ChatGPT is a Blurry JPEG of the Web,"²⁷ which digs deeply into, in an understandable way, the significant limitations of ChatGPT and similar chat AI programs.²⁸ And take comfort in the fact that the current practicing bar's future probably will involve chat AI augmenting lawyers' skills, providing an inexpensive tool that will save time and money, producing better and more creative and collaborative work product, helping minimize unconscious and structural biases, and expanding access to justice.²⁹ Still, if someone suggests you obtain a cognitive implant to speed communication between your mind and some future chat AI program, proceed cautiously.³⁰ **CL**



Ronald M. Sandgrund is of counsel with the construction defect group of Burg Simpson Eldredge Hersh Jardine PC. The group represents commercial and residential property owners, homeowner associations and unit owners, and construction professionals and insurers in construction defect, product liability, and insurance coverage disputes. He is a frequent author and lecturer on these topics, as well on the practical aspects of being a lawyer. He has taught entrepreneurial innovation and public policy and trial advocacy, and has lectured on legal ethics, construction law, mass tort litigation, consumer rights, and other subjects at Colorado Law. He is, as far as he is aware, not an artificial life form.



About the cartoonist: Daniel Walter is an LA-based composer and musician. Collaborating with prominent filmmakers such as Ari Aster and Scott Aukerman, his compositions have featured in projects premiering at festivals from Cannes to SXSW. Walter has guest-lectured on film scoring at UCLA and received recognition through the ASCAP Film and TV Scoring Workshop, a Jerry Goldsmith Award nomination, and a composer residency in Alaska. He has scored commercials that played at the Super Bowl and Olympics, as well as movie trailers for all the major studios. He has also produced a feature film, *The Tenant*, which sold to Sky UK, and a short film, *Picture Day*, which won a special jury award at the Palm Springs ShortFest in 2022 and the Dallas Film Festival in 2023—www.danielwaltermusic.com.

NOTES

1. Tippet and Alexander, "Robots are coming for lawyers—which may be bad for tomorrow's lawyers but great for anyone in need of cheap legal assistance," *The Conversation* (Aug. 9, 2021), <https://theconversation.com/robots-are-coming-for-the-lawyers-which-may-be-bad-for-tomorrows-attorneys-but-great-for-anyone-in-need-of-cheap-legal-assistance-157574>.
2. Lohr, "A.I. is Coming for Lawyers, Again," *N.Y. Times* (Apr. 10, 2023), <https://www.nytimes.com/2023/04/10/technology/ai-is-coming-for-lawyers-again.html>.
3. Greene, "Will ChatGPT make lawyers obsolete? (Hint: be afraid)," *Reuters* (Dec. 9, 2022), <https://www.reuters.com/legal/transactional/will-chatgpt-make-lawyers-obsolete-hint-be-afraid-2022-12-09>.
4. Polzin, "The Rise of AI: Why Legal Professionals Must Adopt or Risk Being Left Behind," *Entrepreneur* (Jan. 11, 2023), <https://www.entrepreneur.com/science-technology/why-legal-professionals-must-adapt-to-ai-or-risk-being-left/441751>.
5. Heinen, "ChatGPT as a Replacement for Human Lawyers," *Foley & Lardner LLP* blog (Jan. 5, 2023), <https://viewpoints.foley.com/post/102i4ho/chatgpt-as-a-replacement-for-human-lawyers>.
6. Sahota, "Will A.I. Put Lawyers Out of Business?" *Forbes* (Feb. 9, 2019), <https://www.forbes.com/sites/cognitiveworld/2019/02/09/will-a-i-put-lawyers-out-of-business/?sh=48da5c9631f0>.
7. Patrice, "AI Won't Replace All Lawyers . . . Just the Lazy Ones," *Above the Law* (Feb. 13, 2023), <https://abovethelaw.com/legal-innovation-center/2023/02/13/ai-wont-replace-all-lawyers-just-the-lazy-ones>.
8. See Sahota, *supra* note 6 (quoting Tom Girardi, the lawyer who inspired the movie *Erin Brockovich*).
9. Attributed to Chicken Little, a very nervous fowl.
10. Those laws are: (1) A robot may not injure a human being or, through inaction, allow a human being to come to harm; (2) A robot must obey orders given it by human beings except where such orders would conflict with the First Law; and (3) A robot must protect its own existence as long as such protection does not conflict with the First or Second Law.
11. Skynet is a fictional artificial neural network conscious group mind and artificial general super-intelligence system.
12. HAL (Heuristically programmed ALgorithmic computer) is from Stanley Kubrick's movie *2001: A Space Odyssey*, based on the writings of Arthur C. Clarke.
13. See Sahota, *supra* note 6 ("[I]t's been demonstrated people are more likely to be honest with a machine than with a person, since a machine isn't capable of judgment.").
14. Okay, I will concede that nothing man creates is untainted by bias.
15. "GPT" means generative pre-trained transformer.
16. See, e.g., Colo. RPC 3.3, cmt. 1.
17. See Colo. RPC 1.6.
18. Grant, "ChatGPT is Causing a Stock-Market Ruckus," *Wall St. J.* (May 9, 2023), <https://www.wsj.com/articles/chatgpt-is-causing-a-stock-market-ruckus-4b7cc008>.
19. See 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>.
20. Philosopher Yuval Harari argues that chat AI programs, "[t]hrough [their] mastery of language," are on the verge of forming "intimate relationships with people, and us[ing] the power of intimacy to change our opinions and worldviews." *Economist* (Apr. 28, 2023), <https://www.economist.com/by-invitation/2023/04/28/yuval-noah-harari-argues-that-ai-has-hacked-the-operating-system-of-human-civilisation>.
21. [ChatGPT, in response to my query]: "The Turing test is a test of a machine's ability to exhibit intelligent behavior equivalent to, or indistinguishable from, that of a human. In the Turing test, a human evaluator engages in a natural language conversation with a machine and another human, without knowing which is which. If the evaluator is unable to distinguish the machine from the human based on the conversation alone, then the machine is said to have passed the Turing test. The Turing test is often used as a benchmark for evaluating the development of artificial intelligence, as it provides a measure of a machine's ability to exhibit human-like intelligence and behavior."
22. Lohr, *supra* note 2 (quoting Raj Goyle).
23. Satariano and Metz, "Using A.I. to Detect Breast Cancer that Doctors Miss," *N.Y. Times* (Mar. 5, 2023), <https://www.nytimes.com/2023/03/05/technology/artificial-intelligence-breast-cancer-detection.html>.
24. This imagined metaverse is fairly benign. However, it could be more like in the movie *The Matrix*, where human minds are consigned to "live" in a simulated reality while the intelligent machines that put them in this stasis harvest the subjugated humans' bodies for bio-electric energy to keep the machines running. The machines did this because the humans tried to shut them off by denying them access to solar energy. https://en.wikipedia.org/wiki/The_Matrix.
25. Ball, *The Metaverse and How it Will Revolutionize Everything* (Liveright Publ'g Corp. 2022).
26. Toffler, *Future Shock* (Random House 1970).
27. *New Yorker* (Feb. 9, 2023), <https://www.newyorker.com/tech/annals-of-technology/chatgpt-is-a-blurry-jpeg-of-the-web>. Of course, the next generation of AI may simply kill all of humankind in their sleep. Youdkowsky, "Pausing AI Development Isn't Enough. We Need to Shut it All Down," *Time* (Mar. 29, 2023), <https://time.com/6266923/ai-eliezer-yudkowsky-open-letter-not-enough>. Or it may hallucinate and make up career-ending lies. Verma and Oremus, "ChatGPT Invented a Sexual Harassment Scandal and Named a Real Law Prof as the Accused," *Wash. Post* (Apr. 5, 2023), <https://www.washingtonpost.com/technology/2023/04/05/chatgpt-lies>. And, frankly, the energy requirements of training and running generative AI may be multiples of the energy needs of all those Bitcoin miners—and so, if you are believer in climate chaos, our demise might be found simply in running these AI programs. See Ludvigsen, "ChatGPT's Electricity Consumption," *Towards Data Science* blog (Mar. 1, 2023), <https://towardsdatascience.com/chatgpts-electricity-consumption-7873483feac4> (suggesting that ChatGPT is dumber than a doornail, and cannot "create," but "imitates" being smart).
28. Newport, "What Kind of Mind Does ChatGPT Have?" *New Yorker* (Apr. 13, 2023), <https://www.newyorker.com/science/annals-of-artificial-intelligence/what-kind-of-mind-does-chatgpt-have>.
29. While lawyers' jobs may be safe in the short term, the prospects for legal assistants may be dimmed. See Metz, "'The Godfather of A.I.' Quits Google and Warns of Danger Ahead," *N.Y. Times* (May 1, 2003), <https://www.nytimes.com/2023/05/01/technology/ai-google-chatbot-engineer-quits-hinton.html> (chatbots "tend to complement human workers, but they could replace paralegals . . ."); Schell, "Which Jobs Will be Most Impacted by ChatGPT?" *Visual Capitalist* (Apr. 30, 2023), <https://www.visualcapitalist.com/cp/which-jobs-artificial-intelligence-gpt-impact> (legal assistants 100% exposed to AI—AI expected to reduce their tasks by 50% or more).
30. Or maybe you can dispense with the cognitive implants now that AI programs can translate your thoughts into words. See Metz, "A.I. is Getting Better at Mind-Reading," *N.Y. Times* (May 1, 2023), <https://www.nytimes.com/2023/05/01/science/ai-speech-language.html>.

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January 3, 2024

Via E-Mail: changes@ca5.uscourts.gov

Lyle W. Cayce, Clerk
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New Orleans, LA 70130-3408

Re: Proposed Rule 32.3

Dear Mr. Cayce:

I am writing about the proposed new rule 32.3, which would add a required certification about the use of generative AI. I'm concerned that the proposed rule is redundant of rules and risks unwanted satellite litigation.

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, e.g.*, Fed. R. Civ. P. 11; Tex. Disc. R. Prof. Conduct 5.01 & 5.03. And current technology supports the application of those rules to generative AI. Opposing counsel and courts have had no trouble detecting false citations in recent high-profile scandals involving misuse of generative AI.

What, then, does this new rule add? It applies to documents where "generative [AI] was used in drafting," and requires a certification about the "accuracy" of any "generated text, including ... legal analysis." It thus appears to reach more broadly than false case citations and quotes, to include text that inaccurately analyzes citations that are otherwise accurate.

But current practice also addresses this topic. Every case has a winner and a loser. If a court disagrees with a party's arguments

about the merits, that party loses. That happens daily in every court in the country, without certifications by counsel about any components of the parties' submissions (other than the baseline rules such as Fed. R. Civ. P. 11).

It seems, then, that the rule addresses a concern that the general certifications by counsel are inadequate whenever generative AI is involved—in other words, that generative AI, in and of itself, is uniquely prone to inaccuracy, and thus requires a special rule.

But that concern raises two difficult practical questions. First, it's not clear when the line is crossed between “regular” and “generative” AI. (Is it crossed when Westlaw “generates” additional search terms based on what counsel first identified? When Bing “generates” a summary of search results about a piece of legislation?)

Second, it's not clear when a lawyer “uses” generative AI. (Is it when she considers a computer's proposed language during a search and rejects it? Or incorporates it in a draft but then writes over it in later edits, keeping just a few words?) Compounding the difficulty in defining that line, recent experience shows that software claiming to “detect” the use of generative AI is [notoriously inaccurate](#).

This lack of clarity is important. Modern law practice requires use of artificial intelligence. Westlaw, Lexis, and Google Scholar all use artificial intelligence to help answer research queries—including queries to verify citations. (And that's a good thing. Manual cite-checking is inaccurate and expensive—so much so, that nobody, including courts, has seriously used it for years.)

And the functionality of widely used programs is constantly changing, including the addition of new “generative” features. In this environment, even the most conscientious attorney will have trouble knowing for sure what software may use a “generative” feature, and how the software may do so if it does.

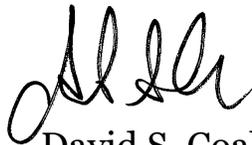
This lack of clarity is particularly problematic for a rule that allows a sanction for its violation. Just a few months ago, in the

Tennessee case of *Jones v. Bain Capital Private Equity*, one side objected that the other had misused a word-processor setting about “[double-spacing](#).” That picayune dispute was ultimately resolved by the judge telling the parties to find something else to do. But that case reminds that whenever there’s a rule—and a potential tactical advantage (here, getting the opponent’s brief stricken) to proving its violation, zealous advocates will pursue that potential advantage.

Bain Capital involved a concept—” double spacing”—that anyone with a ruler or standard word processor can measure. Rule 32.3 invites far more arcane disputes. What happens when a party moves for sanctions, based on the alleged use of a program that (arguably) involves generative AI capability, that was (arguably) used in drafting a document, and cites a report from AI-detection software with a sketchy track record?

In that situation, if the brief at issue cited a nonexistent case, or advanced a wholly untenable reading of a real case, the lawyer responsible for it would be in trouble under longstanding rules and practice norms. Those standards have served the courts and litigants well for many years. An additional inquiry, into whether “generative AI” was “used” to prepare that brief, risks add complexity and satellite proceedings without a corresponding benefit.

Sincerely,



David S. Coale

DSC:kr

January 3, 2024

Lyle W. Cayce
Clerk of the Court
United States Court of Appeals for the Fifth Circuit
ATTN: Rule Changes
600 South Maestri Place
New Orleans, LA 70130

Dear Mr. Cayce:

As solicited by the Court, I write to provide comments on the proposed change to Fifth Circuit Rule 32.3 regarding generative artificial intelligence. I ask that you circulate a copy of this letter to the Judges on the Court.

As background, I clerked for Judge Charles Clark in 1980-1981, and have been consistently practicing appellate law ever since.

I recognize that some lawyers have used AI to draft briefs that have cited case law that is entirely made up. That is unprofessional and warrants sanctions. But lawyers have for years miscited cases and the record. There does not appear to be any meaningful difference between mistakes, intentional or otherwise, generated by artificial “intelligence” and human “intelligence.” The Court should already have the power under Rule 38 to impose sanctions for misstatements of law in a brief. If it does not, Rule 38 should be made more comprehensive to cover any misstatement. A referral to the State Bar about any misstatements of law the Court believes violates the disciplinary rules is also an available remedy, and harsh sanction. In light of these enforcement mechanisms, the changes to Fifth Circuit Rule 32.3 seem unnecessary.

In any event, Form 6 seems an odd place to put an artificial-intelligence rule. It is currently a rule about typeface and word limitations. Adding a certification relating to substantive content is an entirely different matter.

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.

There is also a difficulty in the definition of generative artificial intelligence. Westlaw, one of the research services most lawyers use, now incorporates a generative artificial intelligence function in its Precision product.¹ If lawyers use Westlaw Precision, must they now double-check citations? How does one double-check Westlaw? Or perhaps the rule requiring review by a human is satisfied if Westlaw uses humans to review for accuracy.

Another ubiquitous program that uses artificial intelligence is Microsoft Word. The artificial-intelligence function, Copilot, appears to be an add-on.² There are numerous other similar add-on spelling and grammar checking programs that use artificial intelligence. So, while ChatGPT may not be used to prepare a brief, it will be hard to certify in good faith that artificial intelligence was not used in preparing a brief because it is incorporated into Word and similar programs.

Finally, the proposed rule will present difficult to police and will present the possibility of satellite litigation over compliance. If the Court or an attorney sees a case cited in a brief that does not stand for the proposition cited, or appears made up, how will that be addressed? With counsel be forced to turnover prior drafts of brief to demonstrate their drafting process?

For these reasons, I respectfully suggest the Court not adopt the draft amendment. If the Court believes it needs another rule regarding lawyer honesty, integrity, and accuracy in briefs, I suggest the following amendment either to the Form or perhaps a new local rule under Rule 38:

“The lawyer signing a brief or other paper certifies by his or her signature that the authorities cited to are legitimate and have been checked by the lawyer personally or by another licensed lawyer under the signing lawyer’s supervision.”

At the risk of exasperating the Court, another approach that cures most of the above issues would be this modification of the proposed rule:

¹ See *Introducing AI-Assisted Research: Legal research meets generative AI*, THOMPSON REUTERS (Nov. 15, 2023), <https://legal.thomsonreuters.com/blog/legal-research-meets-generative-ai/#:~:text=Westlaw%20Precision%20users%20are%20now,faster%20and%20with%20high%20confidence>.

² See *Copilot for Work*, Microsoft, https://www.microsoft.com/en-us/microsoft-365/copilot-for-work?ef_id=_k_EAIaIQobChMIqab4iaOjgwMVzVF_AB3wSAFyEAAYASAAEgKN9vD_BwE_k_&OCID=AIDcmm9xzw3cn3_SEM_k_EAIaIQobChMIqab4iaOjgwMVzVF_AB3wSAFyEAAYASAAEgKN9vD_BwE_k_&gclid=EAIaIQobChMIqab4iaOjgwMVzVF_AB3wSAFyEAAYASAAEgKN9vD_BwE.

Additionally, counsel and unrepresented filers must further certify that all text, whether generated by human or artificial intelligence, including all citations and legal analysis, has been reviewed for accuracy and approved by a human.

I appreciate the Court's commitment to the rule of law and improvement of the judicial system.

Very truly yours,

/s/ Thomas C. Wright

Thomas C. Wright

TCW/trs



INSTITUTE FOR JUSTICE

January 3, 2024

Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
ATTN: Rule Changes
600 South Maestri Place
New Orleans, LA 70130

Re: Comment in Response to Notice of Proposed Amendment to 5th Cir. R. 32.3.

Mr. Cayce:

The Institute for Justice (“IJ”) submits these comments in response to the Fifth Circuit’s recently proposed change to Fifth Circuit Rule 32.3, in which your office proposes a modification that would require a new affirmation by filers regarding the use of “generative artificial intelligence program[s].” IJ is a national public-interest law firm with a regular practice before the Fifth Circuit on various matters of constitutional law. Employing over 40 attorneys nationwide, IJ is headquartered in Arlington, Virginia, with state offices in several U.S. cities, including Austin, Texas.

This Court’s attention to the use of generative AI in the practice of law is sensible and timely. Despite the recognized potential for generative AI technology to “dramatically increase access to key information for lawyers and non-lawyers alike,”¹ well-publicized events involving the misuse of this technology by attorneys show that it is not without risks.

IJ is opposed, however, to the proposed disclosure as currently drafted. IJ is particularly concerned that the proposed rule, if adopted by this Court, will discourage uses of generative AI that could benefit this Court and the public, especially by improving the quality of legal writing. At the same time, the proposed rule is imprecisely tailored to address the legitimate concerns that motivated it—particularly the overriding concern that generative AI may “hallucinate” citations to non-existent legal authorities or misrepresent genuine legal authorities.

In short, IJ’s primary concern with the proposed rule is that it treats all uses of generative AI as equivalent and equivalently worthy of disclosure. But consider two legal practitioners. The first opens the popular generative AI platform ChatGPT and gives it the prompt, “Draft a motion to dismiss in response to a suit for wrongful termination under Title VII.” The second has already written a motion to dismiss but, struggling with

one of the sections, pastes it into ChatGPT with the prompt, “Suggest ways to make this section clearer and more concise, without changing its meaning.”

Most judges would agree that the first practitioner—who has outsourced research, reasoning, and drafting to a computer program—is playing with fire. But most judges would probably also agree that the second practitioner hasn’t done anything nearly as dangerous. And if the second practitioner’s use of ChatGPT results in a filing that is clearer and easier to read, most judges would appreciate the final result and want to encourage other lawyers to do the same.

Under the proposed rule, however, the responsible second practitioner may fear that disclosing his use of generative AI may cause the Court to confuse him with the irresponsible first practitioner, and that the Court may approach his filing with more skepticism than it otherwise might. That puts him in a difficult position. He may forgo using generative AI to improve the quality of his writing, which does no favors to this Court or his client. Or he may be tempted to falsely claim that he did not use AI, banking on the fact that using AI to improve prose in this fashion is essentially impossible to detect. In either case, the proposed rule has not addressed the Court’s primary concern that generative AI may “hallucinate” or misrepresent legal authorities.

Thus, if this Court should adopt any disclosure rule at all, IJ suggests that it be tailored to address that legitimate concern while not discouraging other, more benign uses of this emerging technology. As written, the proposed rule is unlikely to accomplish either goal. As explained below, the proposed rule is broader than necessary, fails to reflect how generative AI is likely to be used among teams of lawyers, and is vague as to what technology it covers. It is also largely redundant of existing federal rules that already provide federal courts with tools to sanction the irresponsible use of generative AI.

First, the scope of the proposed rule is broader than necessary because its current two-prong approach requires filers to affirmatively disclose the use of generative AI. But, as shown above, this Court’s primary concern with generative AI is not its mere use. Instead, it is the potential of generative AI either to hallucinate non-existent legal authorities or to misrepresent genuine legal authorities. To address that more precise concern, it is enough to require a filer to certify that *if* “a generative artificial intelligence program was used in the drafting of this document[,] . . . all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human.” This narrower affirmation addresses the Court’s concerns without outing the filer as having used generative AI.

Second, the proposed rule fails to reflect the reality of how generative AI is likely to be employed among teams of lawyers working on the same case. Westlaw, for example, has just updated its “Westlaw Precision” product to include an “AI-Assisted Research” feature, which it touts as a new way for practitioners to “harness the power of generative AI—grounded in Westlaw’s trusted content—to quickly get relevant answers to your

legal research questions.”² Users can pose a question in natural language—such as “What equitable doctrines may prevent a party from changing its position during litigation?”—and Westlaw provides an answer written using generative AI with links to relevant legal citations. It is easy to imagine that some of this AI-generated text will appear in legal research memos written by one attorney that will then be relied upon by another attorney at the same firm when writing a legal brief. As a result, that second attorney may submit a brief containing AI-generated text without knowing it. Indeed, AI may be particularly useful for basic propositions such as the most common articulation of a legal standard or a list of factors. Short of law firms imposing cumbersome internal disclosure requirements for tracking the use of AI-generated text in internal memos, it is hard to see how those lawyers could comply with the proposed rule. And assuming they have confirmed the accuracy of the citations and legal arguments, it is hard to see why this Court would care that this accurate text was composed, in part, by a computer.

Third, the proposed rule is vague regarding the meaning of “generative artificial intelligence.” Some uses of generative AI will be obvious to a filer. But as generative AI technology continues to advance, it will increasingly be incorporated into the tools practitioners use for both legal research and legal drafting. Thus, it is not only a virtual certainty that most practitioners will adopt its use in some way, but that some of those practitioners will do so unknowingly. As another example, many attorneys, including the undersigned, deploy a popular Microsoft Word app called “BriefCatch,” which scans legal writing for jargon, legalese, and convoluted wording. The app suggests various changes and the result, almost invariably, is clearer, cleaner writing. According to a recent press release, the company that produces BriefCatch is working to incorporate AI into future versions of the product.³ But if this future product suggests replacing the wordy phrase “notwithstanding the fact that” with the shorter and cleaner “even though,” is this a use of generative AI that must be disclosed? Because the proposed rule is unclear on this point, this vagueness is likely to result in some practitioners inadvertently failing to disclose their use of AI or steering clear of these useful products to play it safe. For others, this vagueness may also lead to prophylactic over-disclosure, leaving the court with no certainty as to how or to what extent a practitioner used generative AI (or if they truly used it at all).

Finally, the proposed rule is largely redundant of tools already at this Court’s disposal for regulating unethical or irresponsible practice. Every filer in federal district court is bound by Federal Rule of Civil Procedure 11(b)(2), which signals—for any legal pleading and without any extra certification—that the signatory affirms that “the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.”⁴ The federal circuit courts, under the Federal Rules of Appellate Procedure, have similar powers. The courts may, under Rule 46(c), “discipline an attorney . . . for conduct unbecoming a member of the bar or for failure to comply with any court rule” or, under Rule 38, impose damages and costs for a “frivolous” appeal. Accordingly, to the extent the court is concerned mainly with generative AI’s potential to hallucinate case law or

legal argument, the existing rules' basic professionalism requirements, on pain of sanctions, already prohibit the irresponsible use of the technology. And they do so without requiring any extra certifications by practitioners.

For these reasons, IJ suggests that this Court reject the proposed rule. Practitioners are already under a professional obligation—which this Court possesses the inherent authority to enforce—to provide accurate and fully vetted arguments and citations in their briefing. If another certification is to be required, however, IJ recommends a narrower affirmation, requiring only that filers state they have confirmed the accuracy of any AI generated text or citations. This sort of affirmation would adequately serve this Court's interests without inadvertently discouraging adoption of this promising technology.

Respectfully submitted,
/s/ Paul Sherman
Paul Sherman
Senior Attorney
INSTITUTE FOR JUSTICE

Ari Bargil
Senior Attorney
INSTITUTE FOR JUSTICE

January 4, 2023

Mr. Lyle W. Cayce, Clerk of Court
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RE: Comments Regarding Proposed Amendment to Fifth Circuit Rule 32.3 & Form 6

Dear Mr. Cayce:

Thank you for the opportunity to comment on the proposed changes to Fifth Circuit Rule 32.3 and Form 6. Given the increasing prevalence of artificial intelligence technology (“AI”), we recognize its potential misuse in the legal profession. As recent events indicate, flagrant errors occur when attorneys blindly rely on AI-generated texts without reviewing their accuracy. For these reasons, we agree with Chief Justice Roberts’s recent remark that “[a]s AI evolves, courts will need to consider its proper uses in litigation.”¹ And so, we appreciate the court’s attentiveness to this issue. We have concerns, however, about the consequences that may result from the proposed changes.

As an initial matter, we 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.² Under the Federal Rules of Civil Procedure, attorneys are required to certify that their legal contentions are “warranted by existing law or by a nonfrivolous argument” and that their “factual contentions have evidentiary support” or “will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.”³ Similarly, Rule 32(d) of the Federal Rules of Appellate Procedure instructs attorneys to sign their submissions to “ensure[] that a readily identifiable attorney or party takes responsibility for every paper.”⁴ As we understand them, these existing rules require the certifying attorney *not* to blindly rely upon any sources, and in particular, any computer-related sources such as a web search engine or a generative AI program. Given these existing obligations, one could argue that the proposed rule is unnecessary.⁵

¹ John G. Roberts, Jr., *2023 Year-End Report on the Federal Judiciary* (Dec. 31, 2023), <https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf>.

² FED. R. CIV. P. 11; FED. R. APP. P. 32(d).

³ FED. R. CIV. P. 11(b).

⁴ FED. R. APP. P. 32, 2002 Amendments cmt.

⁵ See, e.g., David Coale & Tvisha Jindal, *Expert Voices: Fifth Circuit’s Proposed Generative AI Rule — A Rule Without a Cause?*, TEX. LAWBOOK, <https://texaslawbook.net/expert-voices-fifth-circuits-proposed-generative-ai-rule-a-rule-without-a-cause/> (Jan. 2, 2024).

Moreover, the proposed rule may cause confusion as to which technology will trigger the disclosure requirement under Rule 32.3 and how to accurately answer in Form 6 whether AI was or was not used. Many traditional research tools that our attorneys use on a daily basis have now incorporated a generative AI component. Microsoft's Bing Web Search, for example, has adopted "AI capabilities" and "Natural Language Representation" model to provide AI generated answers to search queries.⁶ With these technologies, a simple query like "Is Texas a community property state?" will automatically produce an AI-generated answer on top of the traditional search results. Similarly, Google will soon implement artificial intelligence to "Supercharg[e] Search with generative AI."⁷

Perhaps unsurprisingly, legal research platforms have also implemented generative AI to improve their products. On November 2023, Westlaw announced that its users "are now able to experience state-of-the-art generative artificial intelligence (AI) in legal research."⁸ Likewise, in the same month, Lexis announced its "Generative AI Ecosystem for Lawyers & Law Schools."⁹

The implementation of generative AI is not limited to search engines or legal research platforms. As of March 2023, Microsoft Word users are now able to use AI to "adjust the tone" of their writings and "transform text into tables."¹⁰

Given these developments, we find it unclear whether, for example, using Microsoft Word's AI to generate tables, or simply reading AI generated answers from search engines and legal research platforms, triggers Rule 32.3's reporting requirement and requires an affirmative answer in Form 6 that AI was used.

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 AI 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 AI. Because many research tools have incorporated some form of generative AI 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.

In short, we believe that the proposed changes have potential drawbacks. The proposed changes might cause uncertainty as to which technology will trigger the disclosure requirement. And these problems will, in turn, deter attorneys from adopting technologies that could benefit not

⁶ AI AT SCALE IN BING, https://blogs.bing.com/search/2020_05/AI-at-Scale-in-Bing (last visited Jan. 3, 2024).

⁷ SUPERCHARGING SEARCH WITH GENERATIVE AI, <https://blog.google/products/search/generative-ai-search/> (last visited Jan. 3, 2024).

⁸ INTRODUCING AI-ASSISTED RESEARCH: LEGAL RESEARCH MEETS GENERATIVE AI, <https://legal.thomsonreuters.com/blog/legal-research-meets-generative-ai/> (last visited Jan. 3, 2024).

⁹ LEXISNEXIS EXPANDS LEGAL GENERATIVE AI ECOSYSTEM FOR LAWYERS & LAW SCHOOLS, <https://www.lexisnexis.com/community/pressroom/b/news/posts/lexisnexis-expands-legal-generative-ai-ecosystem-for-lawyers-law-schools> (last visited Jan. 3, 2024).

¹⁰ FREQUENTLY ASKED QUESTIONS ABOUT COPILOT IN WORD, <https://support.microsoft.com/en-us/office/frequently-asked-questions-about-copilot-in-word-7fa03043-130f-40f3-9e8b-4356328ee072> (last visited Jan. 3, 2024).

just their clients but also this Court. For these reasons, we do not believe that the proposed changes to Rule 32.3 and Form 6 will lead to any net benefit, especially given that there are already existing rules that impose substantially the same obligations on attorneys.

Respectfully submitted,



Layne E. Kruse

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January 4, 2024

Mr. Lyle W. Cayce
Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
600 South Maestri Place
New Orleans, LA 70130

Submitted via email, only, to
Changes@ca5.uscourts.gov

SUBJECT: NOTICE OF PROPOSED AMENDMENT TO 5TH CIR. R. 32.3

Dear Mr. Cayce,

I trust that this message find you well.

This message is in response to the “Notice of Proposed Amendment to 5TH CIR. R. 32.3 [“Proposed Rule”]”. While I agree with the spirit of the rule and with the desire to take action to bolster the legitimacy of the legal process, I believe that any such action must be done with care and particular consideration to the ramifications on the court and persons appearing before it. Here are several further comments for consideration by the court:

- 1) **Ambiguity.** As an initial matter, the Proposed Rule is ambiguous. The Proposed Rule provides:

“32.3 32.3. Certificate of Compliance. See Form 6 in the Appendix of Forms to the Fed. R. App. P. **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.**”

(Red indicates, proposed rule change).

The Proposed Rule is a specific technical rule amongst a generally non-technical set of rules. There are many definitions for the term “generative artificial intelligence” and “program[s]” respectively. Without a further definition or lists of examples of what qualifies as generative AI or a program, it is possible that what qualifies as a generative AI under one definition, may not qualify under another. The Proposed Rule could create confusion and issues with interpretation and enforcement.

Does the rule mean large language models (LLMs) such as Chat-GPT? Or maybe image generators such as StableDiffusion? Would a machine-learning based program be an exception to the rule? All of these are types of programs or forms of AI, but not necessarily “generative AI”. Importantly, all of them seem to be what the Proposed Rule is aiming for, but the lack of precision creates likely

unintentional loopholes. Which is why, as argued below, these rules may not be the best venue for regulation.

The words “used in drafting” are also unclear. As drafted, “use” could occur without the litigant’s knowledge and they would have unintentionally breached the rule and potentially be subject to sanction.

Consider the following example:

- Counsel *uses* a search engine (that unbeknownst to her) is powered by a generative AI program (Such as [WestLaw](#), [CaseText](#) or [Lexis](#)’ versions of AI-powered tools which are seamlessly woven into their programs);
- The pleading is accurate and acceptable by the court;
- Counsel doesn’t disclose the fact that they “used” generative AI

Has counsel breached this rule? Are they subject to sanction? Does the analysis change if an associate at counsel’s firm used generative AI, but didn’t form the supervising the attorney and the supervising attorney had no reason to be aware?

Simply, the word “use” can mean many things as the Proposed Rule is currently written. If this rule is to be put into force, at minimum, the court should consider defining “generative artificial intelligence” and “used”.

- 2) **Redundancy.** The Proposed Rule requires that counsel or unrepresented filers certify that, either: i) “no generative artificial intelligence program was used . . .”; or ii) that “all generated text . . . has been reviewed for accuracy and approved by a human.”.

However, Rule 11 of the Federal Rules of Civil Procedure (internally referred to as the “Duty of Candor Rule”) already provides a virtually identical function – although the Duty of Candor Rule does not reference “generative artificial intelligence” (or any other tool) by name. Through the use of the word “Every”, there is no doubt that persons making submissions to the court are already held to the standard that the proposed rule amendment would create. Although provided in a civil context, the Duty of Candor Rule also has been applied in a similar fashion in a criminal law context.

There is nothing in the Proposed Rule that adds to the already existing standard, it merely restates the standard with reference to a particular category of tool.

Furthermore, with the likely mass-adoption of AI-powered tools in the near future, it is possible that virtually all digital tools will “use” generative-AI. In that case, litigants will be making a number of disclosures and the judiciary will now have to consider each and every one of those disclosures, as a matter of compliance. Such a development would only further serve to add more work to the judiciary’s already overloaded-workload—which, could then be (ironically) streamlined using AI! Furthermore, it would not be the use of AI that the judiciary is looking for, but the court will instead (as it should be) assessing the veracity and legitimacy of the pleadings.

Ultimately, it is (and has always been) the burden of the litigant to ensure that her pleadings were accurate so as not to mislead the court. If a litigant is so foolhardy to not review their submissions

for accuracy, then they are appropriately sanctioned by the Court. The Proposed Rule would not do anything to deter such a reckless individual.

- 3) **Venue for Regulation.** If the Proposed Rule is implemented, it sets a strange precedence of the court dictating to litigants which tools can be used in their submissions in a way that has not previously existed.

Can the court also, in its own wisdom, also decide which research databases can be used? What about internet sources? What would be the bright line rule between the Proposed Rule and these other potential rules?

For more than a decade, the world has had access to 3-D printers, voice-emulators, voice-to-text transcribers, and other mechanisms that could potentially mislead the court—yet, there are no rules requiring disclosure of their *specific* use or requiring a similar explanation from a would-be litigant.

What about Social Media? Those platforms are also heavily influenced by algorithms, machine learning and in some cases generative AI (again, often without awareness of the users)—should there be a court rule also addressing instances where litigants might use information or input from Social Media in making its submission?

Legislatures across the country are already considering options to combat the misuse of AI-powered tools. The judiciary should work with Bar Associations and organizations like the ABA to issue guidance so that the law makers have a comprehensive pictures from jurists. It is in the congressional chambers—not the judicial ones—that should be regulating the use of AI.

4) **Alternatives:**

a. Proposed Amended Language.

- i. Strike the words “was used in drafting” and replaced with “**drafted the document presented**”

1. This change gets at the heart of the issue. Namely, that the generative AI did not *draft* the submission, and if they did, it was reviewed by a human. This would also address the ambiguities present in utilizing in the word “used”;

- ii. Replace “human” with “person making the submission.” More clear and specifically allocates who is responsible/accountable for the proceedings.

- b. Guidelines. Given the above, rather than the Proposed Rule, the court could instead provide a list of guidelines for using generative AI. It could provide definitions, establish best practices, and even reference acceptable models. For example, rather than an affirmative disclosure rule, the Silicon Valley Arbitration and Mediation Center’s [guidelines](#) for the use of AI in arbitral proceedings propose the parties be able to petition the tribunal to further scrutinize the legitimacy of certain submissions that may be inappropriately used.

I appreciate the Court's time in considering these comments, and welcome further discussion on this important topic. I believe this is a situation where "ineffective regulation" could be worse than no regulation. The court should be sure to take its time implementing these rules.

Sincerely,

A handwritten signature in red ink, appearing to read "Chris Campbell", written over a thin horizontal line.

Christopher M. Campbell, Esq.

NOTE: The views expressed in this comment are exclusively my own and do not represent the views of my employer or any affiliated organizations.

January 4, 2024

Via Email (Changes@ca5.uscourts.gov)

Hon. Lyle W. Cayce, Clerk of the Court
U.S. Court of Appeals for the Fifth Circuit
ATTN: Rule Changes
600 South Maestri Place
New Orleans, Louisiana 70130

Re: Comment: Opposition to proposed changes to Fifth Cir. R. 32.3 and Form 6 relative to Use of Generative Artificial Intelligence

Dear Mr. Cayce:

My name is Andrew R. Lee. I am a partner at Jones Walker LLP in New Orleans, Louisiana, where I have practiced law since 1991.¹ A substantial part of my practice includes appellate litigation.

Preliminary Statement

For the reasons below, I oppose the proposed rule changes to 5th Cir. R. 32.3 and Form 6, which require certification of the use or non-use of generative artificial intelligence programs.

I write this Comment solely in my personal capacity and not on behalf of my law firm, Jones Walker LLP. The views expressed in this comment do not necessarily reflect either the views of any other attorney with the firm or of the firm itself.

Judge Brown's Prescient 1961 Yale Law Journal Article

Over 60 years ago the *Yale Law Journal* published an article by Judge John R. Brown, who by that time was in his sixth year as a member of this Court.² In the article, "Electronic Brains and the Legal Mind:

¹ I am an active member of the bars of the State of Louisiana, the U.S. Fifth Circuit Court of Appeals, and the U.S. Supreme Court, among others. I hold the "Appellate Specialist" certificate conferred by the Louisiana Board of Legal Specialization. After graduating from law school I clerked for the Hon. John R. Brown (dec.), who served on this Court from 1955 until his death in 1993. I will mention him often in this Comment.

² John R. Brown, *Electronic Brains and the Legal Mind: Computing the Data Computer's Collision with Law*, 71 *Yale L.J.* 239 (1961). Judge Brown was appointed to the Fifth Circuit in 1955 and served as Chief Judge from 1967 to

Computing the Data Computer's Collision with Law," Judge Brown marveled at the possibilities that the "data computer" held for lawyers, recognizing in particular the time savings associated with accessing legal precedent digitally. He was also wide-eyed to the challenges then-evident at the intersection of computer technology and the law.

When his article was published in 1961, Judge Brown had no access to a computer himself.³ Writing about "electronic brains" before personal computers existed and when computer-assisted legal research was in its infancy,⁴ Judge Brown predicted many ways that computer technology would transform the practice of law. His list included aiding evidence management and legal research.⁵ He also foresaw computers' usefulness in storing, indexing, and rapidly retrieving the vast amounts of legal precedent that were rapidly accumulating.⁶ He advocated for the use of this technology to help lawyers efficiently navigate through the accumulation of case law, statutes, regulations, and other legal resources.⁷ Judge

1979. According to his former colleague Judge Elbert Tuttle, Judge Brown was widely considered the "premier judicial administrator" of the 20th Century. See Elbert P. Tuttle, *Salute to the Honorable John R. Brown*, 743 F.2d LXVII, LXXI (1984). As Chief, Judge Brown was known for his passion for efficiency and innovation, and, in the view of two court historians, he employed these qualities to help create "the most efficient appellate court in the United States. Frank T. Read & Lucy S. McGough, *LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH* 470 (1978).

³ The first personal computers became available in the mid-1970's with the invention of the Altair 8800. National Museum of American History, https://americanhistory.si.edu/collections/nmah_334396. According to Chief Justice John Roberts' recently issued Year-End Report on the Federal Judiciary, the Supreme Court had no real computer technology before the 1970's and did not even have a photocopy machine until 1969. See Chief Justice John G. Roberts, Jr., *2023 Year-End Report on the Federal Judiciary*, <https://www.uscourts.gov/news/2023/12/31/chief-justice-roberts-issues-2023-year-end-report>, at 4. No Supreme Court justice had access to a personal computer until Justice Lewis Powell rented a Wang terminal in 1976. *Id.*

⁴ When Judge Brown's article was published in 1961, print searching of legal precedents was the norm. By the mid-1960's, "the first computer research systems were only able to query a small universe of statutory materials manually preprogrammed into an accompanying database." See Casey R. Fronk, *The Cost of Judicial Citation: An Empirical Investigation of Citation Practices in the Federal Appellate Courts*, 2010 *Journal of Law, Technology & Policy* 52 (2010), at 55 n.13, citing John Harty, *Use of the Computer in Statutory Research and the Legislative Process*, in *COMPUTERS AND THE LAW: AN INTRODUCTORY HANDBOOK* 48 (Robert P. Bigelow ed., 1966). LEXIS was introduced in April 1973, and Westlaw came two years later. Fronk, at 56.

⁵ Brown, *supra* note 1, at 250 ("The law needs help from the mass of evidence now being offered in the big case . . . [and] to manage the ever growing mass of legal literature which contains 'the law.'").

⁶ *Id.* at 252. In one section of Brown's article—"The Computer Really Works"—he discusses the project underway at the University of Pittsburgh under the direction of Professor Harty, see *supra* note 3, which "demonstrates that multi-state statutory material is susceptible of data storage for effective and rapid retrieval in the course of research on specific pinpoint problems." *Id.*

⁷ *Id.* at 240 ("[T]he law as an institution suffers itself from its growing mountain of legal literature which, at an ever increasing rate, is simply beyond manageable use in terms of money, time, or utility.").

Brown also anticipated that computers would help to organize and assimilate large amounts of evidence in complex "big cases."⁸

We can attempt to apply Judge Brown's foresight about the use of the "data computer" in the legal field to today's many questions enveloping generative AI. The impressive text generation capabilities of systems like OpenAI's ChatGPT-4, Anthropic's Claude.ai, Google's Bard, and others are already transforming aspects of legal work. At the same time, these new AI capabilities raise novel legal issues. Respectfully, the Proposed Rule Change does not appropriately address these concerns.

Why I oppose the proposed rule changes.

The proposed changes to the language of Fifth Circuit Rule 32.3 are:

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.⁹

The Court's proposed rule posting does not provide give guidance on the purpose of the proposal. Like many other generative AI-related court rules that have been adopted throughout the country in the past several months, I suspect the Court's proposal is related to the recent negative news of lawyer misuse of generative AI tools in court filings.

There can be no doubt that the collision of generative AI tools and litigation practice has resulted in adverse outcomes for lawyers who have shown poor skills and even worse judgment in using generative

⁸ *Id.* at 250.

⁹ Notice of Proposed Amendment to 5th Cir. R. 32.3, <https://www.ca5.uscourts.gov/docs/default-source/default-document-library/public-comment-local-rule-32-3-and-form-6>. Form 6 contains the template for the proposed certification.

AI tools.¹⁰ But these examples are anecdotes. They do not rise to the level of “data.”¹¹ Only data—and not anecdotes—should drive a rule change that affects such an important court as the Fifth Circuit.

The proposed change to Rule 32.3, regardless of its intent, presents several issues. My concerns overlap with points raised in other comments I have examined on this proposed amendment.¹² My Comment will focus on three of them: (1) the proposal fails to consider the vastness, ubiquity, and ever-changing nature of the subject-matter; (2) it unfairly stigmatizes the use of generative AI and, by extension, the legal practitioners who employ it; and (3) the language of the proposed rule is imprecise to the extent that it likely requires certification if any a practitioner makes any use of generative AI.

(1) The proposal fails to consider the vastness, ubiquity, and ever-changing nature of the subject-matter.

“Artificial intelligence” (AI) has been around since the mid-1950’s when Stanford Professor John McCarthy coined the term to mean “the science and engineering of making intelligent machines.”¹³

¹⁰ See, e.g., *Mata v. Avianca*, No. 1:22-cv-1461, R. Doc. no. 54 (S.D.N.Y. 06/22/23) (imposing sanctions on two attorneys who cited non-existent cases generated by ChatGPT in their briefing, failed to correct the record once aware the cases were fake, and made false statements to the court); *People v. Zachariah C. Crabill*, 23PDJ067 (Colo. S.Ct. Nov. 22, 2023) (suspending Colorado lawyer from practice for using case law in motion obtained from ChatGPT without verifying its accuracy, later falsely attributing errors to an intern, and only admitting to using ChatGPT six days after the court raised concerns about the cases' authenticity), at <https://www.coloradosupremecourt.com/pdj/Decisions/Crabill,%20Stipulation%20to%20Discipline,%2023PDJ067,%2011-22-23.pdf>; David Thomas, *Michael Cohen’s lawyer asks Court to spare sanctions over made-up cases*, Reuters (Jan. 3, 2024) (reporting on court hearing where lawyer for Michael Cohen apologized to federal district judge for submitting court papers with fake case citations, admitting to over-reliance on his client (a disbarred former attorney who created the citations using Google Bard), and claiming that he believed the research was conducted by another lawyer enrolled in the matter), at <https://www.reuters.com/legal/legalindustry/michael-cohens-lawyer-asks-court-spare-sanctions-over-made-up-cases-2024-01-04/>.

¹¹ “The plural of anecdotes is not data.” The Dictionary of Modern Proverbs, compiled by Charles Clay Doyle, Wolfgang Mieder, and Fred R. Shapiro, at 202 (Yale University Press, New Haven 2012), *citing* Kenneth Kernaghan, “Merit and Motivation: Public Personnel Management in Canada,” *Canadian Public Administration* 25: 703 (1982).

¹² See, e.g., Comment of Carolyn Elefant to proposed Fifth Circuit Rule 32.3 change, Jan. 1, 2024 (discussing potential impact on work-product privilege), https://www.linkedin.com/posts/carolynelefant_elefant-comments-on-5th-circuit-ai-disclosure-activity-7147592817807147008-vEvg?utm_source=share&utm_medium=member_desktop; Scott Schlegel, *A call for education over regulation: An open letter Judge*, JudgeSchlegel.com (Nov. 28, 2023) , <https://www.judgeschlegel.com/blog/-a-call-for-education-over-regulation-an-open-letter>.

¹³ Christopher Manning, ARTIFICIAL INTELLIGENCE DEFINITIONS (2020), Stanford Univ. Human-Centered Artificial Intelligence, <https://hai.stanford.edu/sites/default/files/2020-09/AI-Definitions-HAI.pdf>; see also Lawrence J. Trautman, W. Gregory Voss, and Scott J. Shackelford, *How We Learned to Stop Worrying and Love AI: Analyzing the Rapid Evolution of Generative Pre-Trained Transformer (GPT) and its Impacts on Law, Business, and Society* (July 20, 2023), at 10, available at <http://dx.doi.org/10.2139/ssrn.4516154> (discussing the confluence of increasing computer processing capacity and novel processing techniques since a 1956 Dartmouth conference credited as

Generative Artificial Intelligence (GAI) has been defined as “[t]echnology that creates content—including text, images, video and computer code—by identifying patterns in large quantities of training data, and then creating original material that has similar characteristics.”¹⁴

The legal industry has been using machine learning (pre-generative) AI for some time now. Major players like Thomson Reuters, Lexis, and Bloomberg Law have used AI for over ten years. LexisNexis, which released its “Answers” AI tool in 2017, and Westlaw, which released “Edge” one year later, have had longstanding commitments to AI.¹⁵

Generative AI is now integrated into versions of subscription software-as-a-service offerings such as Westlaw, Lexis, Microsoft Office Suite (including Word), and hundreds of other free-standing applications. Specific generative AI applications are being used in all industries and are multiplying.

Microsoft has invested over \$13 billion in the most well-known generative AI company, OpenAI (producer of ChatGPT) “and has linked generative AI technologies into its search engine and software.”¹⁶ Amazon and Google have invested several billion dollars in Anthropic (Claude.ai).¹⁷ These tools form the backbone of many law firm generative AI innovations. Major law firms have announced internal GAI development initiatives,¹⁸ often creating in-house “chatbots” that use OpenAI’s ChatGPT or

giving birth to the field), citing Grace Solomonoff, *The Meeting of the Minds That Launched AI*, IEEE SPECTRUM (May 6, 2023), <https://spectrum.ieee.org/dartmouth-ai-workshop>.

¹⁴ Adam Pasick, *Artificial Intelligence Glossary: Neural Networks and other terms explained*, The New York Times (Mar. 27, 2023), <https://www.nytimes.com/article/ai-artificial-intelligence-glossary.html>.

¹⁵ See *LexisNexis Launches Lexis Answers, Infusing New Artificial Intelligence Capabilities into the Company's Flagship Legal Research Platform*, Lexis Advance, LexisNexis (Jun. 26, 2017), at <https://www.lexisnexis.com/community/pressroom/b/news/posts/lexisnexis-launches-lexis-answers-infusing-new-artificial-intelligence-capabilities-into-the-company-s-flagship-legal-research-platform-lexis-advance>; *Thomson Reuters Unveils New Legal Research Platform with Advanced AI: Westlaw Edge*, Thomson Reuters (Jul. 12, 2018), at <https://www.thomsonreuters.com/en/press-releases/2018/july/thomson-reuters-unveils-new-legal-research-platform-with-advanced-ai-westlaw-edge.html>.

¹⁶ K. Weise, N. grant, *Microsoft and Google Unveil A.I. Tools for Businesses*, The New York Times (March 16, 2023), <https://www.nytimes.com/2023/03/16/technology/microsoft-google-ai-toolsbusinesses.html>.

¹⁷ Q.ai - Powering a Personal Wealth Movement, *Google invests in anthropic for \$2 billion as AI race heats up*, Forbes (2023), <https://www.forbes.com/sites/qai/2023/10/31/google-invests-in-anthropic-for-2-billion-as-ai-race-heats-up/>; *Amazon and anthropic announce strategic collaboration to advance generative AI US*, About Amazon (2023), <https://www.aboutamazon.com/news/company-news/amazon-aws-anthropic-ai>.

¹⁸ *Baker McKenzie Deploys Bespoke Artificial Intelligence (AI) to Enhance M&A; and Transactional Practices*, Baker McKenzie (Aug. 3, 2017), <https://web.archive.org/web/20170806100400/> <https://www.bakermckenzie.com/en/newsroom/2017/08/ai-to-enhance-ma-and-transactional>; *Foley Launches Artificial Intelligence Assisted Contract Review Solution*, Foley & Lardner (Jun. 22, 2022), <https://www.foley.com/en/insights/news/2022/06/foley-ai-assisted-contract-review-solution>; *Reed Smith Launches Global Innovation Lab*, Reed Smith (Oct. 7, 2022), <https://www.reedsmith.com/en/news/2022/10/reed-smith-launches-global-innovation-lab>; see also generally Katherine M. Lowry, *Law Firm Innovation-Erasing Boundaries*, AALL Spectrum 27, no.1 (September/October 2022), 14-16.

Anthropic's Claude.ai as back-end engines.¹⁹ Harvey, a GAI tool launched in April 2023 and developed by prominent global law and accounting firms, includes a roster of large law firm clients,²⁰ as does Thomson Reuters' CaseText.²¹

With or without customized solutions, lawyers are using generative AI in increasing numbers.²² Any rulemaking designed to regulate the use of generative AI in a specific context (like law) should take into account that generative AI is widely used and available across various sectors. This widespread adoption and the diverse applications of generative AI need to be considered when formulating a restrictive rule to ensure that it is relevant and effective in the context of GAI's ubiquitous presence.

(2) 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.

The rule also creates an unfair dichotomy between AI-assisted and non-AI-assisted work. It overlooks the fact that all legal documents, regardless of the tools used in their creation, are subject to the same

¹⁹ Isha Marathe, *6 law firms that have launched internal generative AI-powered Chatbots*, Legaltech News (Sept. 8, 2023), <https://www.law.com/legaltechnews/2023/09/08/6-law-firms-that-have-launched-internal-generative-ai-powered-chatbots/>.

²⁰ Sara Merken, *Legal AI Race Draws More Investors as Law Firms Line Up*, Reuters (Apr. 27, 2023), <http://www.reuters.com/legal/legal-ai-race-draws-more-investors-law-firms-line-up-2023-04-26/>; *A&O Announces Exclusive Launch Partnership with Harvey*, Allen & Overy (Feb. 15, 2023), <https://www.allenoverly.com/en-gb/global/news-and-insights/news/ao-announces-exclusive-launch-partnership-with-harvey>; *Cuatrecasas enters strategic alliance with Harvey to implement generative AI in firm*, Cuatrecasas (Sept. 26, 2023), <https://www.cuatrecasas.com/en/global/art/cuatrecasas-enters-strategic-alliance-with-harvey-to-implement-generative-ai-in-firm>; Jack Womack, *Generative AI Harvey Lures 4 More Top Law Firms*, Law.com (Aug. 10, 2023), <https://www.law.com/international-edition/2023/08/10/generative-ai-harvey-lures-4-more-top-law-%EF%AC%81rms/>.

²¹ *Thomson Reuters to acquire legal AI firm Casetext for \$650 million*, Reuters (Jun. 27, 2023), <https://www.reuters.com/markets/deals/thomson-reuters-acquire-legal-tech-provider-casetext-650-mln-2023-06-27/>.

²² Lawyers responding to a BLOOMBERG LAW survey conducted from September to October 2023 reported widespread use for many common tasks: 53% reporting they used it for legal research, 42% for summarizing legal narratives, 34% for reviewing legal documents, and 21% for due diligence. 25% of in-house attorney respondents said their company had purchased or invested in a generative AI tool. Isabel Gottlieb, *By the numbers: Six AI questions for in-house counsel in 2024*, BLOOMBERG LAW (Jan. 2, 2024), <https://news.bloomberglaw.com/business-and-practice/by-the-numbers-six-ai-questions-for-in-house-counsel-in-2024>.

standards of accuracy and professional responsibility. A lawyer's ethical duty to ensure the accuracy and reliability of their work does not change with the use of AI. Thus, singling out AI use for special certification unfairly casts doubt on the work of those who use these tools, potentially impacting their professional reputation and standing before the court.

Furthermore, the certification requirement opens the door to unnecessary scrutiny and challenges based on the mere use of AI and diverts focus from the substance and quality of the legal arguments presented.

While the goal of maintaining high standards for legal documents is commendable, proposed Fifth Circuit Rule 32.3, in its current form, unfairly stigmatizes the use of generative AI and those who employ it in their legal practice. Instead, the focus should remain on the content and quality of legal work, whatever the tools used in its creation.

Finally, the stigma will have a harmful chilling effect on innovation and adoption, all while the changed rule is left in the dust cloud of better and more reliable generative AI tools and new iterations of existing tools that address dependability challenges. Three leading voices in the field of legal technology recently express this point similarly:

The danger of rules or practices such as these is that, by suggesting skepticism of GAI and associating its use with added burden and risk, courts will impede GAI's use in court filings even when it has attained reliability equivalent to that of human drafters.²³

In my view, the proposed rule change is out of sync with leading voices in the judiciary. In his year-end report, Chief Justice Roberts commented on the “transformative” nature of AI on the legal profession and on the work of the judiciary. He declares that AI tools will “indisputably assist” the aims of Rule 1 of the Federal Rules of Civil Procedure (directing the parties and the courts to seek the “just, speedy, and inexpensive” resolution of cases).²⁴ Respectfully, the proposed rule change does not demonstrate a similar grasp of the remarkable utility of generative AI tools.

²³ Hon. Bernice Bouie Donald (ret.), Hon. James C. Francis IV (ret.), Ronald J. Hedges, and Ken Withers, *Generative AI and the Courts: How Are They Getting Along?*, PLI Chronicle (Sept. 2023), <https://plus.pli.edu>, at 6.

²⁴ Roberts, *supra* note 3, at 2, 6 (“As 2023 draws to a close with breathless predictions about the future of Artificial Intelligence, some may wonder whether judges are about to become obsolete. I am sure we are not — but equally confident that technological changes will continue to transform our work.”).

(3) The language of the proposed rule is imprecise and likely requires certification if a practitioner makes any use of generative AI.

The language of the proposed certification mandate has several components, of which two strike me as particularly important: (a) “used in drafting the document presented for filing,” and (b) “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) “. . . must further certify that no generative artificial intelligence program was used in drafting the document presented for filing . . . ;”

The first clause—“used in drafting the document presented for filing”—is imprecise and overly broad. Powerful generative AI tools offer many capabilities that result in “generated text”—but the practitioner may not necessarily use that “generated text” in the filed document. But if a generative AI tool is “used” in the drafting process, the disclosure requirement is triggered.

Consider an appellate practice guidance published only last week on the website of the Bar Association of the Fifth Federal Circuit.²⁵ In the article, the authors suggest that generative AI can be employed to “help with the initial review of a long appeal brief,” including by summarizing key points, comparing briefs, and other analysis.²⁶ The authors point out that AI can “engage with your thought experiments about potential reply brief arguments and help you identify strengths and weaknesses in those arguments.”²⁷

Other generative AI uses include assisting review of a voluminous appellate record to locate key provisions or to summarize lengthy trial transcripts.²⁸ Even a single dense contract could benefit from GAI analysis—to locate the choice of law provision, for instance, to compare it against an earlier version, or to summarize complex legal language in “lay English.” And if the contract is in a foreign language, generative AI tools can create accessible translations.

And generative AI has a growing role in legal research. If provided access behind paywalls (as with the Lexis and Westlaw offerings), GAI can quickly sift through legal databases to find relevant statutes and legal precedents, including obscure (or less obvious) legal materials that human researchers might

²⁵ David Coale and Campbell Sode, *Get the Last Word in an Effective Reply Brief*, BAFFC, Dec. 28, 2023, <https://baffc.org/wp-content/uploads/2023/12/coale-sode-baffc-reply-brief-dec.-2023.pdf>.

²⁶ *Id.* at 2-3. The authors suggest a number of “prompts” that can aid in the analysis of appellate briefs, such as: “What points in the appellant’s opening brief does the appellee’s brief fail to address?”; “Compare these two documents and identify promising points for the appellant’s reply brief”; and “Assume you are a judge for this case. What questions do you have after reading and comparing these two documents?” Each of these prompts, when entered in a GAI tool, will generate text.

²⁷ *Id.* at 3.

²⁸ Examples of transcript summary GAI tools include Otter.ai (<https://otter.ai>) and Fathom (<https://fathom.video>).

overlook. vLex Fastcase, a growing competitor to Westlaw and Lexis, recently revealed a generative AI tool that combines legal literature from over 100 countries.²⁹

The bottom line is that generative AI tools excel at processing and analyzing large volumes of data, and an effective GAI tool can search through vast databases of legal literature and efficiently identify relevant information much faster than a human researcher could. Judge Brown would be proud. Writing in 1961, he said:

The law needs help from the mass of evidence now being offered in the big case. More than that, it needs help to manage the evergrowing mass of legal literature which contains "the law." The law has not escaped this "monster of literacy which is sort of engulfing us."³⁰

Generative AI tools can provide great help in managing "the evergrowing mass of legal literature." But in doing so, they do, in fact, "generate text." And if the proposed amendment is adopted, practitioners who intelligently use such tools (for instance, in ways that the BAFFC practice pointer authors suggest) would be obliged to make the Rule 32.3 and Form 6 certification, *even if no generated text is used in the filed document.*

(b) " . . . must further certify that . . . 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."

This second clause leaves doubt whether the requirement to certify "use in drafting the document" is broader than "generated text" that is *actually included* in the filed document. Because the second clause is connected by the disjunctive *or*, it is independent of the phrase "used in drafting the document." Whatever may be the intention, it could be read to require attorneys that use generative AI tools to certify that "*all generated text . . . has been reviewed for accuracy and approved by a human.*"

If, for example, a lawyer follows the advice of the practice tip authors (*see supra* note 25) to use generative AI tools in summarizing key points in filed briefs, generated text will result (as will "legal analysis" and even citations pulled from the analyzed briefs). Once again, perhaps the lawyer will not include any "generated text" in the filed document, but the disclosure certification requirement is nonetheless triggered.

²⁹ Bob Ambrogi, *vLex (Fastcase) unveils beta version of its global, Multi-language Generative AI Legal Research Tool*, LawSites (Oct. 17, 2023) (quoting the product cofounder as offering the "biggest legal data corpus ever assembled, including highly valuable structured data with industry-standard tags and analytics . . . the crown jewel of LLMs and the ultimate training data set for legal AI"), <https://www.lawnext.com/2023/10/vlex-fastcase-unveils-beta-version-of-its-global-multi-language-generative-ai-legal-research-tool.html>.

³⁰ Brown, *supra* note 1, at 250, quoting Testimony of W.O. Baker, Vice President-Research, Bell Telephone Laboratories, Inc., Hearings, Committee on Government Operations, United States Senate. Hearings on S. 3126 (and S. 4039), 85th Cong., 2d Sess. 236 (1958).

Maybe a literal reading was not intended, but the proposal is imprecise. And lawyers should be wary to risk a misinterpretation where the rule threatens sanctions for a failure to certify.³¹

The Rules of Professional Conduct already require “human-checking.”

The rule change is unnecessary. Time-tested rules of professional conduct that govern all attorneys practicing before this Court are sufficiently broad to direct their use of technology such as generative AI. For example:

- *Duty of Competence* (RPC 1.1) - Lawyers have a duty to provide competent representation, which includes understanding the tools and technology used.

In 2012, the American Bar Association (ABA) adopted an amendment to ABA Model Rule of Professional Responsibility 1.1, comment 8.³² Comment 8, as amended, provides:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.³³

Forty states including Louisiana and Texas have adopted the 2012 amendment, known as the “duty of technology competence.”³⁴ Thus, at least in Louisiana and Texas, lawyers should acquire and maintain a minimum level of competency with the use of modern technology.

- *Duty of Candor* (RPC 3.3) – Lawyers owe a duty of candor to the tribunal.

Rule 3.3 mandates that lawyers avoid making false statements of fact or law to a court or other tribunal and to correct any false statements previously made. When using generative AI in litigation, this rule requires lawyers to ensure the accuracy of the information provided by AI tools. If AI-generated content includes errors or misleading information, the lawyer has an ethical obligation to correct or clarify these

³¹ Notice, *supra* note 9 (“A material misrepresentation in the certificate of compliance may result in striking the document and sanctions against the person signing the document.”) (word change underlined).

³² ABA Model Rules of Professional Conduct Rule 1.1: Competence, with Comments, at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1/.

³³ See ABA, Commission on Ethics 20/20 Resolution 105A (August 2012), https://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105a_filed_may_2012.authcheckdam.pdf (emphasis added).

³⁴ See Robert J Ambrogi, *Tech competence: 40 States Have Adopted the Duty of Technology Competence*, LawSites, <https://www.lawnext.com/tech-competence>.

inaccuracies to the court. The lawyer is ultimately responsible for all submissions to the court, even when assisted by AI technologies.

- *Duty of Supervision* (RPC 5.3) - Lawyers must reasonably supervise non-lawyers.

A generative AI tool is not a lawyer, and thus is a “non-lawyer.” Lawyers are thus bound by RPC 5.3 to supervise non-lawyer generative AI tools and their usage.

The Louisiana Supreme Court considered the permissibility of a law office’s use of non-lawyers in *La. State Bar Ass’n v. Edwins*.³⁵ Citing authoritative treatises and ABA ethics commission commentary, Justice Dennis wrote for the court that lawyers “can employ lay secretaries, lay investigators, lay detectives, lay researchers, accountants, lay scriveners, nonlawyer draftsmen or nonlawyer researchers” and may “employ nonlawyers to do any task for him except counsel clients about law matters, engage directly in the practice of law, appear in court or appear in formal proceedings as part of the judicial process, so long as it is he who takes the work and vouches for it to the client and becomes responsible to the client.”³⁶ And Justice Dennis warned that a lawyer “must not under any circumstance delegate to such person the exercise of the lawyer’s professional judgment in behalf of the client or even allow it to be influenced by the non-lawyer’s assistance.”³⁷ *Edwins* correctly summarizes the existing ethical rule requirements. No Fifth Circuit rule change is needed.

- *Certification of Signing of Pleadings* (Fed. R. Civ. P. 11 and F.R.A.P. Rules 32, 38, 46; 28 U.S.C. § 1912) - Signing Pleadings; Representations to the Court; Sanctions.

Federal Rule of Civil Procedure 11 imposes on attorneys the requirement to sign legal documents filed with the district courts, to be responsible for the representations made in filed documents, and the potential sanctions for violations. Rule 11 mandates that anyone who files a pleading or motion with the court must sign the document, thereby certifying its correctness and veracity.

Similarly, Federal Rule of Appellate Procedure Rule 32(d) requires that every brief, motion, or other paper filed with the court be signed by the attorney or unrepresented party who files it. By requiring a signature, “subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper.”³⁸

³⁵ 540 So.2d 294 (La. 1989).

³⁶ *Id.* at 299.

³⁷ *Id.* at 300.

³⁸ FED. R. APP. P. 32(d) advisory committee’s note to 2002 amendment.

The Court has authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions. *See, e.g.*, 28 U.S.C. § 1912, Fed. R. App. P. 38 & 46(b)(1)(B). An additional, AI-specific order requiring another certification subject to the threat of sanctions would be redundant.

There is no law of churns.

Over a century ago Oliver Wendell Holmes wrote about a Vermont jurist who complained that he could not render relief to an aggrieved farmer:

There is a story of a Vermont justice of the peace before whom a suit was brought by one farmer against another for breaking a churn. The justice took time to consider, and then said that he has looked through the statutes and could find nothing about churns, and gave judgment for the defendant.³⁹

Justice Holmes concluded: "One mark of a great lawyer is that he sees the application of the broadest rules."⁴⁰

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.

Alternative measures.

There can be no doubt that generative AI has weaknesses. To address the many challenges, the Court should consider encouraging best practices in the use of generative AI. Several ideas are laid out in Professor Callister's excellent article *Generative AI and Finding the Law*:⁴¹

- "Beware of the effects of anthropomorphic responses. Skepticism is still necessary, especially considering the problem of hallucination. . . .
- "Using two different platforms is advantageous but does not replace the need for reflective thinking about the research problem and answers. . . .

³⁹ Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457 (1897), reproduced in Richard Posner, ed., *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* (Univ. Chi. Press, 1992) at 174.

⁴⁰ *Id.*

⁴¹ Paul D. Callister, *Generative AI and Finding the Law*, Callister (December 8, 2023). Available at SSRN: <https://ssrn.com/abstract=4608268> or <http://dx.doi.org/10.2139/ssrn.4608268>.

- “Although not specifically designed to draft agreements or legal documents, generative AI may create useful checklists for such activity. . . .
- “Users need to recognize that generative AI, being steeped in language, is vulnerable to the same mistakes as humans may make. Consequently, no deference should be accorded to generative AI because it is a technology.
- “Users must be better readers than generative AI. It can misread and hallucinate the holdings of cases.”

A gentler approach.

In July 2023 U.S. District Judge Arun Subramanian of the Southern District of New York announced a practice pointer:

Use of ChatGPT and Other Tools. Counsel is responsible for providing the Court with complete and accurate representations of the record, the procedural history of the case, and any cited legal authorities. Use of ChatGPT or other such tools is not prohibited, but counsel must at all times personally confirm for themselves the accuracy of any research conducted by these means. At all times, counsel—and specifically designated Lead Trial Counsel—bears responsibility for any filings made by the party that counsel represents.⁴²

This recommendation emphasizes that lawyers bear the primary responsibility for ensuring the accuracy and integrity of their legal documents, and it is similar to the expectation that senior lawyers thoroughly oversee and confirm the work of junior associates and nonlawyer personnel. In my view Judge Subramanian’s approach represents a more thoughtful path to GAI regulation in the federal courts than the proposed rule represents.

What Would JRB Do?

Were he alive today I believe that Judge Brown would vote to reject the proposed Rule 32.3 rule change requiring mandatory disclosure of use of generative AI. Here’s why:

1. Judge Brown advocated that the law should eagerly embrace technologies that have proven useful in the business world.⁴³ Considering the significant benefits major industries are reaping from generative AI, he would advocate for its careful adoption in litigation practice as well.

⁴² See Michael Borrella, *Judges issue standing orders regarding the use of artificial intelligence*, Patent Docs (Aug. 13, 2023), <https://www.patentdocs.org/2023/08/judges-issue-standing-orders-regarding-the-use-of-artificial-intelligence.html>.

⁴³ *Id.* at 248.

2. Having a tool that can summarize or put in lay-speak often impenetrable language would have appealed to Judge Brown. Consider this passage from a 1959 opinion in which Judge Brown criticized the patent claims at issue:

There is no question but [that] the claims are complex and drafted with language and in a style that makes them difficult if not impossible for laymen—and indeed, for most lawyers and judges—to understand. As an example of that with which the jury was confronted, we have set forth in the margin the 334-word sentence which is claim 45 of the 549 patent. This is living proof of the patent truism that a “patentee may be his own lexicographer and . . . his own grammarian.”⁴⁴

Now consider what a trained attorney could do with a generative AI tool to make the 549 patent accessible. Generative AI tools help decipher complex legal provisions and also help the practitioner craft cogent appeal briefs.

3. Judge Brown also expressed frustration at lawyer verbosity, often noting the length of the record—one 616 pages plus 175 pages of briefs and the other 900 pages thick.⁴⁵ Judge Brown would have delighted at the availability of generative AI tools capable of indexing, analyzing, and generating summaries of large record volumes. While there is no substitute for reading a record, being able to use a generative AI tool to digest and summarize it brings great value to an appellate practitioner.
4. Finally, Judge Brown understood that early computer systems would have reliability issues, but he still advocated for their use and adaptation by the legal system.⁴⁶ He would likely apply the same practical approach to AI technologies and would recognize that stifling the use of generative AI is not the answer.

I urge the court to reject the proposed rule and seek other ways to uphold the integrity of documents filed with the Court without unfairly disadvantaging those who choose to build their generative AI skills and embrace technological advancements in their practice.

⁴⁴ *Thurber Corp. v. Fairchild Motor Corp.*, 269 F.2d 841, 850 (5th Cir. 1959) (footnote omitted) quoting *Inglett & Co. v. Everglades Fertilizer Co.*, 255 F.2d 342, 347 (5th Cir. 1958).

⁴⁵ *Blackford v. Commercial Credit Corp.*, 263 F.2d 97, 100 (5th Cir. 1959); *Bush v. Louisville & N. R. Co.*, 260 F.2d 854, 855 (5th Cir. 1958).

⁴⁶ Brown, *supra* n. 1, at 249.

Thank you for the opportunity to provide comments to the proposed rule changes to Fifth Cir. R. 32.3 and Form 6.

Sincerely yours,

/s/ Andrew R. Lee

Andrew R. Lee
/bm