

The Current State of US Regulation of the Use of AI in Dispute Resolution

Bradford Newman and Daniel Garrie*

‘The technology you use is only as good as the way you use it to serve humanity. It’s not just about innovation, but about the responsibility that comes with it.’

Satya Nadella

CEO of Microsoft

Introduction: generative AI ushers in the ‘new era’ of AI use in the legal profession

Since the famous computer scientist John McCarthy coined the term ‘artificial intelligence’ at the 1955 Dartmouth Conference, there is no shortage of slightly varying definitions for artificial intelligence (AI), especially within the hallowed halls of academia. But for the purposes of this article, the current definition found in the US National Artificial Intelligence Act of 2020 suffices: ‘The term “Artificial Intelligence” means a machine-based system

* Bradford Newman is the Chair of the AI Subcommittee of the American Bar Association and a leader of Baker McKenzie’s AI Practice. Daniel Garrie is the co-creator of the JAMS AI Disputes Clause and Rules and serves as a mediator, arbitrator, special master, and neutral. He is the Founder and Managing Partner of Law & Forensics LLC and an Adjunct Professor at Harvard University, where he teaches information security, computer forensics, and cybersecurity law. Jacqueline Gerson assisted in the research but is no longer at the firm.

that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments.’¹

Until November 2022, the use cases for AI in the practice of law were largely centred on ‘behind the scenes’ algorithms employed by eDiscovery vendors, narrow work conducted by expensive expert witnesses in a handful of complex cases, and certain legal search engines. Simply stated, AI was not accessible to, nor utilised by, the vast majority of practising lawyers in the United States. Rather, it was employed, in various forms, for deriving predicative analytics from very large data sets based on parameters set by computer scientists who crafted the applicable algorithms.

Everything changed in November 2022 when ChatGPT, a generative AI chatbot created by OpenAI, was released into the wild. This article uses the definition of generative AI found in the US President’s October 2023 Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence: ‘The term “Generative AI” means the class of AI models that emulate the structure and characteristics of input data in order to generate derived synthetic content. This can include images, videos, audio, text, and other digital content.’²

As it is generally accepted that most lawyers choose the profession because of a lack of interest or aptitude in science and maths (or both), a truism to which our more learned colleagues in the Patent Bar or those working in-house in industries like biopharma will take justified offence, the following grossly oversimplified heuristic is useful in understanding the distinction between AI and generative AI.³ An AI program can be written to analyse 25 million actual photographs, with the goal of identifying subject matter; for example, which ones display a piece of fruit and which ones show a dog. Since the data set at issue are photographs, it must be assumed that they depict actual dogs and real fruit. On the other hand, a generative AI algorithm can be created and trained to generate a

1 See HR6216 – National Artificial Intelligence Initiative Act of 2020, 116th Congress (2019–2020), available at: www.congress.gov/bill/116th-congress/house-bill/6216 [last accessed 25 September 2024].

2 See Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (30 October 2023), available at: www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/ [last accessed 25 September 2024].

3 In his capacity as the Chair of the AI Subcommittee of the American Bar Association and a nationally recognised expert in AI who in 2023 was invited by the US Senate to testify on the subject of AI’s societal risks (www.c-span.org/person/bradford-newman/138494/ [last accessed 25 September 2024]), Bradford Newman frequently is asked to teach a continuing legal education-accredited course on AI to judges and lawyers throughout the United States. Mr Newman devised the above heuristic in that context to make these concepts readily accessible to a broad spectrum of lawyers.

synthetic picture of a dog eating a piece of fruit. Both the dog and piece of fruit that the GenAI program create are not ‘real’ – meaning they do not depict someone’s actual dog or a piece of fruit that can be consumed at a restaurant or grocery store. Rather, the GenAI program generates synthetic images based on the data sets on which it has been trained and related computer-science based parameters.⁴

So why, since the release of Chat GPT in late 2022, has the use of generative AI exploded in the legal field? The two main drivers are: (1) the ease of access to and use of generative AI to seemingly do what heretofore required human capital; and (2) a relentless market pressure to perform legal work more efficiently. Suddenly all practising attorneys, including small and even solo practitioners who could never afford access to any ‘AI’ solution, were instantly able to download for free an application on their smartphones that apparently performed key legal tasks. For example, practically overnight, it now appeared to many members of the profession that a free-to-download chatbot could do research in seconds that historically required an expensive human attorney to spend hours or even days performing, and required substantial subscription fees to providers like Westlaw and Lexis.⁵ In fact, the power of AI’s capability in the legal domain was demonstrated when it passed the Bar exam,⁶ surpassing human test takers in the multiple choice portion of the exam, and easily completing the essay portion.⁷ This is not surprising, since AI is designed to save crucial time on certain tasks requiring factual decision making rather than those which require legal discretion or subjectivity.

This article explores the current state of how courts and State Bars throughout the United States are regulating the use of GenAI in the litigation context. It also explains why it is highly unlikely, in contrast to the EU’s approach, that the US Congress will pass federal regulation limiting the use of AI by judges and arbitrators, and instead, leave such

4 This article intentionally avoids covering advanced subjects like neural networks, large language models, or their sub-fields – none of which are necessary to comprehend for the purpose of this article.

5 It is hard to overstate the GenAI craze that the release of Chat GPT set off. Two months after launching, ChatGPT reached 100 million monthly users in January 2023, making it the fastest-growing consumer app in history. To place that metric in perspective, it took TikTok nine months after its global launch to reach 100 million users and Instagram took two-and-a-half years. See, eg www.reuters.com/technology/chatgpt-sets-record-fastest-growing-user-base-analyst-note-2023-02-01/ [last accessed 25 September 2024].

6 Bar Exam Score Shows AI Can Keep Up with ‘Human Lawyers,’ Researchers Say, Karen Sloan (14 March 2023), available at: www.reuters.com/technology/bar-exam-score-shows-ai-can-keep-up-with-human-lawyers-researchers-say-2023-03-15/ [last accessed 25 September 2024].

7 *Ibid.*

potential future AI regulation to the provenance of the states. But first, it is important to understand how the uninformed use of GenAI in the legal domain presents real risks to practitioners and the legal system at large. Left for another day is a focus on the larger societal policies and concerns, in a western liberal legal system based upon the rule of law, occasioned by the proliferation of a computer-based GenAI approach to practising litigation.

So what could go wrong? Lawyers (mis)using GenAI

In June 2023, two US lawyers made headlines for citing case law in their legal briefs submitted to a federal court in the matter *Mata v Avianca* that did not exist and were instead incorrectly ‘generated’ (the proper technical computer science term is ‘hallucinated’) by ChatGPT.⁸ The lawyer responsible claimed he did not realise ChatGPT generated fake cases, ‘even when opposing counsel brought their inability to locate the cases to his attention’.⁹ He emphasised that he thought ‘he was using a new, state-of-the art search engine’ and ‘was not trying to mislead the court or knowingly engage in frivolous or vexatious conduct’.¹⁰

The episode ended when District Court Judge P Kevin Castel of the Southern District of New York sanctioned the *Avianca* lawyers for ‘abandon[ing] 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’. In addition to the sanctions, the attorneys were required to submit apology letters to each of the seven judges who were named as authors of the fake cases cited by ChatGPT.¹¹

There are other examples of lawyers using AI inappropriately for legal research in briefs submitted to courts, including a case involving President Donald Trump’s infamous former lawyer Michael Cohen.¹² And in Colorado, a lawyer was suspended for a year and one day for use of fake AI-generated case citations in his brief, and failure to withdraw the brief

8 *Mata v Avianca, Inc*, 678 F Supp 3d 443, 448 (SDNY 2023).

9 *Ibid* at ECF No 45 (6 June 2023) (Memorandum of Law by Non-Parties Stephen A Schwartz and Levidow & Oberman, PC in Response to 26 May 2023 Order to Show Cause).

10 *Ibid*.

11 *Ibid* at ECF No 57.

12 *US v Michael Cohen*, No 18-CR-602 (JMF) (SDNY 20 March 2024) (Cohen provided fake AI-generated case citations to his attorney, who used the citations in a brief seeking to shorten Cohen’s post-prison supervision sentence).

or notify the court when he became aware of the issue.¹³ The Presiding Disciplinary Judge stated that the lawyer violated several of Colorado's Rules of Professional Conduct including competent representation, reasonable diligence, not knowingly making a false statement to a tribunal, and professional misconduct involving dishonesty, fraud, and deceit.

The lawyers in the cases noted above were rightfully criticised for using GenAI without checking its output for reliability, in violation of various ethical and professional obligations (discussed in more detail later in this article), owed to their clients and the courts. Nevertheless, lawyers in all jurisdictions are required to be up to date and understand the technology available to assist their client.

As this article notes, courts and state regulators are trending toward a somewhat uniform approach to the use of GenAI in the litigation arena. Lawyers must strike a careful balance between utilising GenAI in a limited and responsible (ie proficient) fashion, while ensuring appropriate human oversight and verification, along with appropriate disclosures to their clients and transparency to the courts. It appears likely that in the coming years, many States will need to amend or add new rules of professional conduct to sufficiently encompass the issues presented by the use of GenAI in the legal domain.

Since the practice of law is regulated in the United States by State laws, rather than the federal government, an omnibus and preemptive federal law regulating the use of GenAI by lawyers appears highly unlikely.¹⁴ Thus, unlike the EU AI Act which treats as 'high risk' the use of AI systems by judges, or those working on their behalf, to research, interpret, and apply the facts and the law (and imposes the corresponding restrictions and obligations of the use of such high risk AI systems in the legal domain),¹⁵ the US Congress will likely not directly

13 *People v Zachariah C Crabill*, 23PDJ067 (22 November 2023) (Crabill utilised fabricated ChatGPT case citations, and failed to alert the court or withdraw the motion upon discovering the citations were fake).

14 *Gallo v United States Dist Court*, 349 F 3d 1169, 1180 (9th Cir 2003) (quoting *Leis v Flynt*, 439 US 438, 442 (1979)) ('Historically, however, "the licensing and regulation of lawyers has been left exclusively to the states and the District of Columbia within their respective jurisdictions"').

15 Shaping Europe's digital future, AI Act (1 August 2024), available at: <https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-ai#:~:text=The%20AI%20Act%20is%20the%20first-ever%20legal%20framework,requirements%20and%20obligations%20regarding%20specific%20uses%20of%20AI> [last accessed 25 September 2024].

involve itself in AI regulation over judges and arbitrators (at least with regard to state law judges and arbitrators).¹⁶

However, earlier this year at the State level, Colorado enacted AI legislation (to be effective 1 February 2026) (the ‘Colorado Act’) modelled on a similar law that did not pass in Connecticut, and which, like the EU AI Act, uses a risk-based ranking for AI systems.¹⁷ The Colorado Act regulates AI usage in eight enumerated categories – education opportunities, employment opportunities, health care services, insurance, housing, financial services, an essential government service, or a legal service. The Colorado Act defines a ‘high-risk AI system’ as one that makes or is a substantial factor in a ‘consequential decision’, ie ‘a decision that has a material legal or similarly significant effect on the *provision or denial* to any consumer of, or the *cost or terms* of’, as applicable here, legal services.¹⁸

No definition of ‘legal services’ is provided in the Colorado Act, but the goal of this law makes clear that it is not meant to be applied to judges and arbitrators in Colorado who utilised AI for fact findings or rendering of opinions.¹⁹ The goal of the Act is to prevent algorithmic

16 It is conceivable, though not likely, that Congress could eventually pass AI regulation that also encompasses the use of AI by federal judges. ‘Congress has undoubted power to regulate the practice and procedure of federal courts.’ *Mistretta v United States*, 488 US 361, 387, 109 S Ct 647, 663 (1989). For example, Title 1 of the Judicial Improvements Act of 1990, the Civil Justice Reform Act, implemented oversight of judges’ case management, requiring a semi-annual report of all cases pending over six months. Congress could potentially enact legislation mandating use of AI in certain cases for efficiency, prohibiting it in other use cases, and/or requiring federal judges to disclose AI uses in connection with decision making or similar applications. Alternatively, the Judicial Conference of the United States, which is responsible for creating professional rules of conduct for judges, could modify the rules to include limits or guidelines on AI usage. But so far, that is not the status quo nor are there any proposed changes along these lines contemplated.

17 Colorado Senate Bill 24-205, Concerning Consumer Protections in Interactions with Artificial Intelligence Systems (17 May 2024), available at: https://leg.colorado.gov/sites/default/files/2024a_205_signed.pdf [last accessed 25 September 2024].

18 *Ibid*, emphasis added.

19 The goal of the Colorado Act is to prevent algorithmic discrimination posed by AI developers and deployers. Deployers of AI must comply with the Act’s disclosure requirements, impact assessment, and duties to consumers. The disclosure requirements include providing notice to consumers on a website that they are interacting with an AI system and listing the type of AI system used and the foreseeable risks associated with use of such a system. Additionally, covered entities would be subject to an annual impact assessment of applicable AI systems, and a duty to use reasonable care to protect consumers from reasonably foreseeable risks of algorithmic discrimination, including providing an appeal process for adverse decisions with human review. The Act will not become effective until 1 February 2026 and will likely face constitutional and other challenges once in effect. Based on the text of the Act, as well as its legislative history, it seems unlikely that Colorado Courts are intended to be covered by the Act, or that judges or arbitrators who may one day use AI in the courtroom will be considered ‘deployers’ of AI under the statute.

discrimination by, for example, ensuring that a law firm does not put a potential client's information into AI which generates a higher billing rate for a specific service based on the client's race, or tells the firm that it should deny the client its services based on the probability of success in their case. It seems improbable that the Act was intended to or will apply to judges and courts.

While it is conceivable that an aggrieved litigant could try and argue that a judge or arbitrator who used AI to prepare an order that granted or denied a motion for a given case fits into the Colorado Act's definition of making 'a decision that has a material legal or similarly significant effect on the provision or denial of ... legal services', courts do not 'provide' legal services to any specific person or entity, and the Colorado Act is clearly meant to protect consumers. In fact, the Colorado Act is specifically aimed at 'the provision or denial' and 'the cost or terms of' services generally, which will likely be interpreted to apply to covered lawyers who are retained to provide legal services to specific clients, rather than to courts that represent the public interest of the collective citizens of the State of Colorado in connection with the administration of justice.

In sum, if AI is adopted by judges and arbitrators, it is conceivable that Congress and/or state regulators will act to enact new legislation designed specifically to apply to the use of this technology in the courtroom and in connection with the administration of justice. However, no such proposed law or regulation yet exists.

Trends regarding AI use in courts: transparency, disclosure, human oversight, verification, and limited use

Judges across the United States, through standing orders applicable to lawyers with cases in their courts, have started to regulate or completely prevent the use of AI in the courtroom. The trends are clear: limited use transparency, disclosure, human oversight and verification. In 2023, District Court Judge Brantley Starr of the Northern District of Texas was one of the first to issue a 'Mandatory Certification Regarding Generative Artificial Intelligence'.²⁰ Judge Starr mandates that:

'[a]ll 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 or Harvey.AI) or that any language drafted by generative artificial intelligence will be checked

²⁰ See www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Cole/Artificial%20Intelligence%20standing%20order.pdf [last accessed 11 October 2024].

for accuracy, using print reporters or traditional legal databases, by a human being.’

As of February 2024, about 16 per cent of more than 1,600 US district and magistrate judges across the country have followed suit by including a disclosure requirement for AI usage in their standing orders.²¹ States with judges who have issued the most standing orders regarding AI are California, Oklahoma, Texas, Colorado, Ohio, Pennsylvania, and New York.²² Most orders have similar requirements, mandating disclosure of AI use and ensuring such use complies with a lawyer’s professional duties and responsibilities. For example, Judge Stephen Alexander Vaden of the US Court of International Trade issued a standing order on AI which requires attorneys to provide ‘[a] disclosure notice that identifies the program used and the specific portions of text drafted with the assistance of that program’ in addition to ‘[a] certification that the use of the program has not resulted in the disclosure of any confidential or business proprietary information to any unauthorised party’.²³ Judges in Pennsylvania and Illinois have promulgated similar requirements.²⁴ Some judges have gone a step further, issuing specific prohibitions to lawyers. A Montana federal judge issued an order allowing an attorney to appear *pro hac vice*, on the condition that counsel file an acknowledgment of the court’s prohibition on the ‘[u]se of artificial intelligence automated drafting programs, such as ChatGPT’ within 15 days of the order.²⁵

In 2023, the Fifth Circuit considered adopting a circuit-wide rule requiring attorneys to verify that documents were not written using generative AI, or if they were, that they were checked for accuracy by a human.²⁶ While the rule was ultimately not adopted, it would have been the first of its kind at

21 Available at: www.law360.com/pulse/articles/1810715/judges-and-law-scholars-divided-over-ai-standing-orders [last accessed 25 September 2024].

22 Available at: www.law360.com/pulse/ai-tracker [last accessed 25 September 2024].

23 Judge Stephen Alexander Vaden’s Standing Order is available at: www.cit.uscourts.gov/sites/cit/files/Order%20on%20Artificial%20Intelligence.pdf [last accessed 25 September 2024].

24 See also Judge Michael M Baylson for the Eastern District of Pennsylvania, available at: www.paed.uscourts.gov/sites/paed/files/documents/procedures/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf [last accessed 25 September 2024]; Magistrate Judge Gabriel A Fuentes for the Northern District of Illinois, available at: www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20revision%206-21-23.pdf [last accessed 25 September 2024].

25 *Belenzon v Paws Up Ranch, LLC*, No CV 23-69-M-DWM, 2023 US Dist LEXIS 123020 (D Mont 22 June 2023).

26 Fifth Judicial Circuit Proposed AI Rule available at: www.ca5.uscourts.gov/docs/default-source/default-document-library/public-comment-local-rule-32-3-and-form-6 [last accessed 25 September 2024].

the circuit-wide level.²⁷ The proposed rule received significant backlash,²⁸ One opponent of the rule felt it provided insufficient protection against the dangers of AI undermining the legal system, arguing that allowing the use of AI would allow a ‘robot that can’t think’ to effectively write legal briefs without ‘identifying and understanding different lines of legal analysis’.²⁹ Others contested the rule as unnecessary and already addressed by existing protections, such as Federal Rule of Civil Procedure 11(b), which requires a party’s or lawyer’s signature to certify the good faith and truthful nature of a filing.³⁰ Another noted that specific AI rules are prone to be quickly outdated ‘like Cabbage Patch Kids, pet rocks, and fidget spinners’ which are ‘passing fad[s] that may bring us some amusement but add nothing to substance’.³¹

Regulation through State Bar Association ethical rules

State by State

Six state Bar associations, including California, Michigan, Florida, New Jersey, Pennsylvania, and New York have issued guidance on AI use. The commonality in this guidance highlights that AI does not alter a lawyer’s preexisting professional duties and provides specific scenarios where those duties, such as competency or candor, apply to the use of AI in the practice of law.

CALIFORNIA

On 16 November 2023, the State Bar of California Standing Committee on Professional Responsibility and Conduct issued its Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law (the ‘California Guidance’). It confirms that the use of AI in the practice of law implicates a lawyer’s pre-existing ethical and professional responsibilities

²⁷ Fifth Judicial Circuit Decision to Not Adopt the Proposed AI Rule available at: www.ca5.uscourts.gov/docs/default-source/default-document-library/court-decision-on-proposed-rule.pdf?sfvrsn=5967c92d_2#:~:text=Court%20Decision%20on%20Proposed%20Rule,drafting%20briefs%20at%20this%20time [last accessed 25 September 2024].

²⁸ The Fifth Circuit published comments it received on the proposed rule on 29 January 2024, available at: www.ca5.uscourts.gov/docs/default-source/default-document-library/submitted-comments-compiled.pdf?sfvrsn=c3a9c92d_2 [last accessed 25 September 2024].

²⁹ *Ibid* (comment submitted by Gary L Sasso, President and CEO of Carlton Fields based in Tampa, Florida).

³⁰ *Ibid* (comment submitted by Josh Cottle, Fridge & Resendez PC, in San Antonio, Texas).

³¹ *Ibid* (comment submitted by Brian King, The King Firm, LLC, in New Orleans, Louisiana).

such as the duty of confidentiality and the duty to supervise lawyers and nonlawyers.³² For example, lawyers must not input confidential client information into an AI platform which lacks adequate security because that would violate the duty of confidentiality. The California Guidance instructs lawyers to consult IT professionals and review the terms of use of the AI product to ensure both the security of the information, and that the product does not use the confidential information to train its platform. Additionally, to maintain the duty to supervise lawyers and nonlawyers, managerial and supervisory lawyers are instructed to establish policies regarding use of AI and ensure that policy complies with professional obligations. The California Guidance further suggests that lawyers ‘should consider disclosure to their client that they intend to use generative AI in the representation, including how the technology will be used, and the benefits and risks of such use’. This duty to communicate regarding AI use carries over to the duty of candour to the tribunal, and lawyers ‘should also check for any rules, orders, or other requirements in the relevant jurisdiction that may necessitate the disclosure of the use of [GenAI]’.

MICHIGAN

On 27 October 2023, Michigan released brief guidance on AI use in Ethics Opinion JI-155 (2023), which specifically relates to judicial officers and their duty to maintain competence regarding advancing technologies, including AI.³³ To maintain competence, judicial officers should be aware of the inherent biases of AI, and consider regulating the use of AI in proceedings and documents filed with the court.

FLORIDA

On 19 January 2024, the Florida Bar issued an in-depth formal Ethics Opinion addressing the use of AI by licensed members.³⁴ Florida permits lawyers to use AI but cautions that lawyers must still ‘protect the confidentiality of client information, provide accurate and competent services, avoid improper billing practices, and comply with applicable restrictions on lawyer advertising’. More specifically, lawyers should check an AI platform’s policy on data retention and sharing to ensure confidentiality of client information. Lawyers should not artificially

³² See <https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf> [last accessed 25 September 2024].

³³ State Bar of Michigan AI Ethics, available at: https://www.michbar.org/opinions/ethics/numbered_opinions/JI-155 [last accessed 25 September 2024].

³⁴ Florida Bar Ethics Opinion 24-1, January 19, 2024, available at: <https://www.lawnext.com/wp-content/uploads/2024/01/FL-Bar-Ethics-Op-24-1.pdf> [last accessed 25 September 2024].

inflate their billed time when AI increases efficiency. Furthermore, any AI chatbots utilised by legal advertising must notify users that the chatbot is not a lawyer or employee of the law firm, but part of an AI program.

NEW JERSEY

On 24 January 2024, the New Jersey Supreme Court issued preliminary guidelines on the use of AI.³⁵ Following the New Jersey Supreme Court's guidance, the New Jersey State Bar Task Force on Artificial Intelligence published a report in May 2024 detailing AI's impact on the legal profession and social justice concerns (the 'NJSBA's Report').³⁶ The NJSBA's Report requested the New Jersey Board of Trustees to continue to provide educational opportunities for lawyers on AI use, including the creation of a monthly AI email newsletter, and to establish a permanent group to continually assess AI as applied to the legal profession. The NJSBA Report recommended instituting a requirement that attorneys earn one CLE credit every two years on technology-related legal subjects, and that one of the five required ethics credits for CLE compliance be technology related.

PENNSYLVANIA

On 22 May 2024, the Pennsylvania Bar Association Professional Guidance Committee and the Bar Association Committee on Legal Ethics and Professional Responsibility issued a joint formal opinion regarding the use of AI (the 'PABAR Opinion').³⁷ The PABAR Opinion emphasises that AI 'is not a clean slate, free from prejudices and preconceptions,' and that lawyers have fallen prey both to AI's biases and hallucinations. It provides lawyers with 12 'best practices' for AI, including being truthful and accurate, verifying all citations and the accuracy of cited materials, assuring competence, maintaining confidentiality, identifying conflicts of interests, communicating with clients, assuring information is unbiased and accurate, ensuring that AI is properly used, adhering to ethical standards, exercising professional judgment, utilising proper billing practices, and maintaining transparency.

³⁵ Legal Practice: Preliminary Guidelines on the Use of Artificial Intelligence by New Jersey Lawyers, available at: www.njcourts.gov/sites/default/files/notices/2024/01/n240125a.pdf [last accessed 25 September 2024; restricted access].

³⁶ Task Force on Artificial Intelligence and the Law: Report, Requests, Recommendations, and Findings (May 2024), available at: <https://njsba.com/wp-content/uploads/2024/05/NJSBA-TASK-FORCE-ON-AI-AND-THE-LAW-REPORT-final.pdf> [last accessed 25 September 2024].

³⁷ Pennsylvania Bar Association Joint Formal Opinion 2024-200, Ethical Issues Regarding the Use of Artificial Intelligence (22 May 2024), available at: www.pabar.org/Members/catalogs/Ethics%20Opinions/Formal/Joint%20Formal%20Opinion%202024-200.pdf [last accessed 25 September 2024].

NEW YORK

On 6 April 2024, the New York State Bar Association Task Force on Artificial Intelligence published an extensive 79-page report on AI (the ‘NYSBA Taskforce’s Report’).³⁸ The NYSBA Task Force’s report recommended: (1) adopting AI guidelines and a committee to oversee periodic updates to those guidelines; (2) educating judges, lawyers, law students, and regulators to understand the technology; (3) identifying risks posed by AI that are not addressed by existing laws; and (4) examining the function of law as a governance tool. Additionally, like the California Guidance, the NYSBA Taskforce’s Report contains AI guidelines for legal practice which identify how a lawyer’s duties correspond to AI. For example, Rule 1.2 (Scope of Representation) requires a lawyer to abide by a client’s decisions concerning the objectives of representation. The guidance included in the NYSBA Taskforce’s Report suggests lawyers consider including in a client engagement letter that AI tools may be used in representation of the client and recommends seeking the client’s acknowledgment. It also provides an example of what such an engagement letter provision may look like:

‘Use of Generative AI: While representing you, we may use generative AI tools and technology to assist in legal research, document drafting and other legal tasks. This technology enables us to provide more efficient and cost-effective legal services. However, it is important to note that while generative AI can enhance our work, it is not a substitute for the expertise and judgment of our attorneys. We will exercise professional judgment in using AI-generated content and ensure its accuracy and appropriateness in your specific case.’

A handful of Bars of other States, including those of Texas, Illinois, Kentucky, and Minnesota, have established dedicated task forces on AI to study the use of AI, clearly with an eye towards issuing future guidance and/or regulation.³⁹ For example, on 26 January 2024, The State Bar of Texas’ Taskforce for Responsible AI in the Law (TRAIL) published The Taskforce for Responsible AI in the Law Interim Report to the State Bar of Texas Board of Directors with recommendations to consider

³⁸ Report and Recommendations of the New York State Bar Association Task Force on Artificial Intelligence (6 April 2024), available at: <https://nysba.org/app/uploads/2022/03/2024-April-Report-and-Recommendations-of-the-Task-Force-on-Artificial-Intelligence.pdf> [last accessed 25 September 2024].

³⁹ See www.isba.org/ibj/2024/04/lawpulse/joiningtheairevolution [last accessed 25 September 2024].; www.mnbar.org/docs/default-source/default-document-library/msba-ai-working-group-final-report-and-recommendations.pdf [last accessed 25 September 2024].

(the ‘TRAIL Interim Report’).⁴⁰ The TRAIL Interim Report includes recommendations for different areas of legal practice, including: cybersecurity, education and legal practice, legislative, regulatory, and legal considerations, ethical and responsible use guidelines, access and equity, privacy and data protection, and AI summits and collaborative efforts. On 27 September 2023, Illinois’ State Bar Association AI Committee also published a report with recommendations similarly suggesting developing educational AI programs, conducting studies on the effects of AI on the practice of law and access to justice, and issuing further recommendations to the courts and bar on use of AI.⁴¹ At this point, while none of the reports are binding, they are nevertheless instructive for practitioners and jurists in the relevant jurisdictions.

National ABA Rules

In 2023, the American Bar Association established a Task Force on Law and Artificial Intelligence whose mission is to: (1) address the impact of AI on the legal profession and the practice of law, and related ethical implications; (2) provide insights on developing and using AI in a trustworthy and responsible manner; and (3) identify ways to address AI risks (the ‘ABA Taskforce’). The ABA Task Force focuses on the application of AI to several issues including governance, risk management, access to justice, legal education, and the courts.⁴² For each issue, the ABA has related events and articles discussing different angles addressing each area.

The ABA has also issued three resolutions regarding AI since 2019 – Resolutions 112, 604 and 700; however, only Resolution 112 addresses courts and lawyers. Resolutions 604 and 700 both address governments and organisations.

Resolution 112, passed in August 2019,⁴³ advocates for:

40 Taskforce for Responsible AI in the Law, Interim Report to the State Bar of Texas Board of Directors, available at: www.texasbar.com/AM/Template.cfm?Section=Meeting_Agendas_and_Minutes&Template=/CM/ContentDisplay.cfm&ContentID=62597 [last accessed 25 September 2024].

41 Illinois State Bar Association AI Committee, Report to President Shawn Kasserman (27 September 2023), available at: www.americanbar.org/content/dam/aba/administrative/center-for-innovation/ai-task-force/skm-c360i23100414470.pdf [last accessed 25 September 2024].

42 Task Force on Law and Artificial Intelligence, Addressing the Legal Challenges of AI, available at: www.americanbar.org/groups/leadership/office_of_the_president/artificial-intelligence/ [last accessed 25 September 2024].

43 American Bar Association, House of Delegates Resolution 112, (12 August 2023), available at: www.americanbar.org/content/dam/aba/directories/policy/annual-2019/112-annual-2019.pdf [last accessed 25 September 2024].

‘... courts and lawyers to address the emerging ethical and legal issues related to the usage of [AI] in the practice of law including: (1) bias, explainability, and transparency of automated decisions made by AI; (2) ethical and beneficial usage of AI; and (3) controls and oversight of AI and the vendors that provide AI.’

While Resolution 112 touches on key issues that do need to be addressed, it lacks practical advice for practitioners facing difficult questions on how to use AI ethically.

JAMS AI Rules

On 23 April 2024, JAMS, a provider of alternative dispute resolution services, released new rules governing disputes involving AI (the ‘JAMS AI Rules’).⁴⁴ This is the first time an alternative dispute resolution (ADR) provider has developed specific rules for disputes concerning AI technologies. According to JAMS, the purpose of the JAMS AI Rules is to ‘refine and clarify procedures for cases involving AI systems’, and to ‘equip legal professionals and parties engaged in dispute resolution with clear guidelines and procedures’ that are ‘tailored to the complexities of AI’.⁴⁵ The JAMS AI Rules clarify the procedures for proper filing, service of the request for arbitration, commencement of the arbitration, and service of documents throughout the arbitration for disputes involving AI. These new rules take into consideration novel issues presented by AI, such as questions involving liability, algorithmic transparency, and ethical considerations. The notable aspects of the new JAMS procedure include the appointment and authority of a chairperson, the notice of claims, preliminary conferences, and the exchange of information. The JAMS AI Rules also contain a default procedure to address the confidentiality and inspection of AI systems at issue in a dispute. Alongside the JAMS AI Rules, JAMS released a model dispute resolution clause that parties seeking to use the JAMS AI Rules can incorporate into their contracts.

44 JAMS Artificial Intelligence Disputes Clause and Rules (15 April 2024), available at: www.jamsadr.com/rules-clauses/artificial-intelligence-disputes-clause-and-rules [last accessed 25 September 2024].

45 JAMS Announces New Artificial Intelligence Disputes Clause and Rules (23 April 2024), available at: www.jamsadr.com/news/2024/jams-announces-new-artificial-intelligence-disputes-clause-and-rules [last accessed 25 September 2024].

Future use of AI

Some judges are becoming more comfortable with the idea of AI use for specific purposes. For example, the Eleventh Circuit recently heard an appeal considering whether a landscaper's insurance should cover an accident in connection with installing a ground-level trampoline for a client.⁴⁶ The insurance company had denied coverage because the accident did not arise from 'landscaping,' but the policy did not define the term. In his concurrence, US Circuit Judge Kevin Newsom of the US Court of Appeals for the Eleventh Circuit mulled over using generative AI to determine the ordinary meaning of 'landscaping'. Judge Newsom wrote:

'Here's the proposal, which I suspect many will reflexively condemn as heresy, but which I promise to unpack if given the chance: Those, like me, who believe that "ordinary meaning" is the foundational rule for the evaluation of legal texts should consider – consider – whether and how AI-powered large language models [LLMs] like OpenAI's ChatGPT, Google's Gemini, and Anthropic's Claude might – might – inform the interpretive analysis. There, having thought the unthinkable, I've said the unsayable.'

Judge Newsom first took the traditional approach by checking the ordinary definition in dictionaries, which he felt left something to be desired. So, Judge Newsom asked his law clerk to run searches on Gemini and ChatGPT regarding whether a trampoline falls into the definition of 'landscaping'. Both platforms answered affirmatively. The case was ultimately resolved without in-depth analysis regarding the ordinary meaning of landscaping, but the process sparked what used to be an 'unimaginable possibility' for Judge Newsom – 'Might LLMs be useful in the interpretation of legal texts?' He landed firmly on 'maybe', taking into consideration drawbacks including: (1) AI's tendency to 'hallucinate' fake answers, (2) LLMs inability to capture offline speech thus missing underrepresented populations' usages; (3) potential manipulation by lawyers, judges, and litigants; (4) and the possibility that reliance on LLMs will lead us into dystopia.

A number of judges around the country commended and criticised Judge Newsom's recommendation. Judge Yvonne E Campos of the Superior Court of California noted that while the suggestion is 'brave', 'we all need to go much deeper than the headlines or even [Newsom's] concurrence

⁴⁶ *James Snell v United Specialty Ins Co*, Case No 22-12581 (11th Cir 28 May 2024) (concurring opinion).

go into in order to understand Gen AI and what LLMs do'.⁴⁷ On the other hand, Fifth Circuit Judge Scott Schlegel of Louisiana stated that '[his] commitment ... to the rules and integrity of the judicial process outweighs the allure of this type of experimentation in real cases at this point in our AI journey'. Judge Schlegel described how even 'unconventional sources like Wikipedia and Google' are typically impermissible, such that the use of a generative AI model would likely also be. He warns that AI use 'could undermine the perceived integrity of the judicial process'.⁴⁸

Judge Newsom is not alone in his AI experimentation, with others believing AI may be a way to increase judicial economy and dispose of the need of judges to decide each element of every case. US District Judge Xavier Rodriguez for the Western District of Texas has decided to test the waters with evidence from a high-profile trial on challenges to Texas' voting and election laws. While Judge Rodriguez's law clerks and interns evaluate the evidence and summarised the key testimony for the court's findings of facts and conclusions of law, AI will simultaneously review the same evidence and create its own report. Only the work generated by the law clerks will be published on the docket, but Judge Rodriguez will publish the results of his AI experiment, which could shed light on AI's capability compared to lawyers and law students.⁴⁹

Conclusion

In his '2023 Year-End Report on the Federal Judiciary' (the 'Chief Justice's Report'), Chief Justice of the United States, John Roberts, examines 'the latest technological frontier: artificial intelligence'.⁵⁰ The Chief Justice's Report first provides a summary overview of technological advances courts slowly adopted, including typewriters and photocopying machines, despite initial scepticism and marvel. Roberts then considers how 'technological changes will continue to transform our work', and acknowledges that 'some may wonder whether judges are about to become obsolete'. While Roberts believes AI excels at tasks which require 'no discretion', such as AI technology

47 Isha Marathe, 'Judges React to 11th Circuit's Gen AI Use: "Creative," Occasionally "Misleading", and "Brave"' (6 June 2024), available at: www.law.com/legaltechnews/2024/06/06/judges-react-to-11th-circuits-gen-ai-use-creative-occasionally-misleading-and-brave/?slreturn=20240610124530 [last accessed 25 September 2024].

48 *Ibid.*

49 Olivia Alafritz, 'Law Clerk vs AI? Courthouse Test Highlights Judicial Curiosity' (3 July 2024), available at: <https://news.bloomberglaw.com/insurance/law-clerk-vs-ai-courthouse-test-highlights-judicial-curiosity> [last accessed 25 September 2024].

50 2023 Year-End Report on the Federal Judiciary, available at: www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf [last accessed 25 September 2024].

which has replaced tennis line judges at the US Open, he unequivocally states it cannot replace the ‘human judgment’ necessary for making ‘legal determinations’ often involving grey areas. He acknowledges that ‘[a]s AI evolves, courts will need to consider its proper uses in litigation’, noting how AI has the potential to expand access to justice, cut down court time on administrative matters, and impact adjudication at the trial level.

The Chief Justice’s Report reflect a cautious and conservative approach to using AI in the judicial system, which is understandable given the high stakes and complex nature of legal disputes. Roberts’ statements recognise the benefits of AI for enhancing efficiency and accessibility but also the limitations and risks of AI for making nuanced and ethical judgments. The comments also indicate that the current state of AI is more suitable for factual tasks than legal ones and that human judges will remain indispensable for resolving gray areas and interpreting the law. His report invites further discussion and research on how to best balance the advantages and challenges of AI in the courts and ensure that AI is used transparent, accountable, and fair.

As Chief Justice Roberts suggests, AI has tremendous potential for use and will likely become more integrated in the US judicial system. However, it will take significant time to develop more reliable versions of generative AI for legal use. Meanwhile, the Courts and State Bar regulators will undoubtedly continue down the path of instituting appropriate guard rails and oversight of AI’s use in the legal profession.