2024 Questionnaire of the 1st Study Commission IAJ-UIM

"The Effects of Artificial Intelligence on the Judiciary"

United States Federal Judges Association

Hon. Marilyn L. Huff, Past President

Questions:

1)   Do judges in your country utilize artificial intelligence technology ("AI"), and how so?

Many judges in the United States use some form of artificial intelligence ("AI") technology in their work and day-to-day life. In 2024, AI is inescapable.[1] Many modern technologies and conveniences that judges use, such as shopping algorithms, social media, navigational aids, and virtual assistants like Siri or Alexa, rely upon AI.[2] Even unlocking a smart phone uses AI facial recognition technology. Many, if not most, U.S. judges utilize AI-powered technologies in their judicial work too, often without realizing it.[3] Indeed, AI drives many common software applications that judges are accustomed to using, including spam email filtering, spell check in word processing programs, translation applications, and search engines like Google or Bing.

Defined broadly, "AI is not a single piece of hardware or software, but rather, a constellation of technologies that gives a computer system the ability to solve problems and to perform tasks that would otherwise require human intelligence."[4] Put simply, AI technologies combine algorithms and data sets to solve real-world problems. AI includes many different, and often interconnected, subsets and fields, including machine learning, natural language processing, artificial neural networks, and deep learning. "Generative AI," a specific subset of AI, creates human-like text, photos, and audio or video recordings in response to natural language prompts provided by a human. Generative AI captured the attention of many U.S. judges when attorneys and self-represented litigants began incorporating the text outputs generated by AI chatbots, such as ChatGPT and Google BARD, into their court filings and other legal documents. Many judges remain cautious about integrating generative AI into their judicial work, given the chatbots' capacity to "hallucinate," *i.e.*, provide false or erroneous responses.

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[1] Hon. Xavier Rodriguez, *Artificial Intelligence (AI) and the Practice of Law*, 24 SEDONA CONF. J. 738, 788 (2023), https://thesedonaconference.org/ sites/default/files/announcements/Artificial-Intelligence-and-the-Practice-of-Law- Xavier-Rodriguez.pdf.

[2] JAMES E. BAKER ET AL., AN INTRODUCTION TO ARTIFICIAL INTELLIGENCE FOR FEDERAL JUDGES 5 (Federal Judicial Center 2023) https://www.fjc.gov/content/375968/introduction-artificial-intelligence-federal-judges.

[3] *See* Rodriguez, *supra* note 1, at 788 ("AI is ubiquitous and already in devices we use daily, including our smartphones and cars.").

[4] National Security Commission on Artificial Intelligence (NSCAI), Interim Report 8 (Nov. 2019), https://www.nscai.gov/wp-content/uploads/2021/01/NSCAI-Interim-Report-for-Congress_201911.pdf.

Rapid developments in AI are impacting and revolutionizing many industries and professions, including the law[5] and government.[6] In December 2023, U.S. Supreme Court Chief Justice John Roberts addressed the potential benefits and challenges that AI presents to the U.S. federal court system in his year-end report.[7] He noted that although the federal judiciary has historically approached advances in computing technology with skepticism, he expressed confidence that technological changes, including advancements in AI technology, will continue to transform judicial work.[8] He also cautioned that judges, however, are in no danger of becoming obsolete.[9]

The U.S. federal court system[10] has started to incorporate more advanced AI technology into its day-to-day functions. In January 2024, Thomas Reuters and the Administrative Office of the U.S. Courts announced that Reuters will provide Westlaw Precision to the federal judiciary, which includes the U.S. Supreme Court and all U.S. circuit, district, and bankruptcy courts.[11] Westlaw Precision incorporates new AI-powered features into its existing legal research capabilities.[12] These features promise to provide courts with a more efficient and accurate research experience.[13] For example, one new feature, Quick Check Judicial, allows court users to upload multiple filings to receive a comprehensive report detailing the validity of the authority cited by

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[5] *See* 24 VOICES FOR 2024: LEGAL TECH TRENDS IN AI & AUTOMATION (NetDocuments 2024) https://www.netdocuments.com/24-voices (providing examples of how various law firms and legal teams have infused AI into their legal practice).

[6] On October 30, 2023, President Biden released Executive Order ("E.O.") 14110, "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence." Exec. Order No. 14110, 88 C.F.R. 75191 (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/. E.O. 14110 "establishes a government-wide effort to guide responsible AI development and deployment through federal agency leadership, regulation of industry, and engagement with international partners." Laurie Harris & Chris Jaikaran, *Highlights of the 2023 Executive Order on Artificial Intelligence for Congress* 1, CONG. RES. SERV. (April 3, 2024). President Biden identified eight overarching policy areas, including safety and security; innovation and competition; worker support; consideration of AI bias and civil rights; consumer protection; privacy; federal use of AI; and international leadership. Within these policy areas, E.O. 14110 "directs over 50 federal entities to engage in more than 100 specific actions to implement the guidance set forth in the E.O." *Id.* at 2. These efforts may include evaluating the use of AI by various U.S. court systems. For example, E.O. 14110 instructs the U.S. Department of Justice to prepare a report on the use of AI in the criminal justice system and recommend best practices for safeguards and use limits of AI. *Id.* at 11.

[7] Chief Justice John G. Roberts, Jr., *2023 Year-End Report on the Federal Judiciary* (Dec. 31, 2023), https://www.uscourts.gov/news/2023/12/31/chief-justice-roberts-issues-2023-year-end-report [hereinafter *"Roberts' Year End Report"*].

[8] *Id.* at 2, 3.

[9] *Id.* at 2.

[10] In addition to the federal judiciary, each state within the United States has its own judicial system, governed by the state's own rules. The policies and procedures of the state court system vary state by state, and each state will likely take its own unique approach to the recent advancements in AI technology and its use by state court judges. Unless otherwise indicated, this report discusses the questions in terms of the United States federal judiciary.

[11] *Thomas Reuters to Provide Westlaw Precision to U.S. Federal Courts*, PRACTICE SOURCE (Jan. 3, 2024) https://practicesource.com/press-release-thomson-reuters-to-provide-westlaw-precision-to-u-s-federal-courts/.

[12] *See id.*

[13] *See* Westlaw Precision, *Precision Research*, https://legal.thomsonreuters.com/en/products/westlaw-precision#precisionresearch (last visited Mar. 28, 2024).

both parties, plus relevant authority that may have been omitted.[14] Use of Westlaw Precision's new features, like Quick Check, varies between judges and their chambers' staff.

a) If not, have judges in your country considered utilizing AI, and, if so, in what ways?

The federal judiciary will continue to consider its use of AI. Specifically, some federal courts are evaluating the utility and reliability of legal research tools that incorporate generative AI technology and are considering making such generative AI tools available to judges and their law clerks. For example, some federal circuits are contemplating whether to provide Westlaw Precision's AI-Assisted Research or LexisNexis's Lexis+ to court users.[15] These tools use generative AI to answer legal questions in a conversational fashion, gather relevant cases, and filter results by legal issues, fact patterns, motion types, and outcomes. Unlike other generative AI chatbots, Westlaw's AI-Assisted Research and LexisNexis's Lexis+ only draw upon caselaw and legal authority from within the Westlaw or LexisNexis universe of authorities, which promotes confidence in the accuracy and reliability of their outputs.

b) Is the use of AI in legal proceedings regulated?

The U.S. federal judiciary has not yet established universally applicable guidelines regulating the use of AI in legal proceedings. However, many federal district courts and judges have adopted judicial standing orders or local rules addressing attorneys' and litigants' use of AI. Judicial standing orders and local rules are forward-looking rules that apply to cases pending before a particular court or judge.

As of April 2024, approximately twenty-four U.S. federal judges or judicial districts have issued standing orders addressing the use of AI in litigation.[16] In May 2023, a federal judge in Texas promulgated the first AI judicial standing order in response to a widely publicized case in which an attorney in New York submitted a brief generated by the popular chatbot, ChatGPT, without first checking its accuracy.[17] The brief contained several citations to nonexistent cases and rulings invented by ChatGPT, exposing to judges that generative AI may produce false, inaccurate, and unreliable outputs.

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[14] *See* Westlaw Precision, *Use Quick Check*, https://www.thomsonreuters.com/en-us/help/westlaw-precision/tools/quick-check.html (last visited Mar. 28, 2024).

[15] *See* Westlaw Precision, *AI-Assisted Research*, https://legal.thomsonreuters.com/en/products/westlaw-precision#aiassistedresearch (last visited Mar. 28, 2024); LexisNexis, *Lexis+*, https://www.lexisnexis.com/en-us/products/lexis-plus.page (last visited Mar. 28, 2024).

[16] *See* Jessiah Hulle, *AI Standing Orders Proliferate as Federal Courts Forge Own Path*, BLOOMBERG LAW (Nov. 8, 2023), https://news.bloomberglaw.com/us-law-week/ai-standing-orders-proliferate-as-federal-courts-forge-own-paths.

[17] Mandatory Certification Regarding Generative Artificial Intelligence, Judge Brantley Starr (N.D. Tex. May 30, 2023), https://www.txnd.uscourts.gov/judge/judge-brantley-starr; Jon Brodkin, *Federal judge: No AI in my courtroom unless a human verifies its accuracy*, ARS TECHNICA (May 31, 2023), https://arstechnica.com/tech-policy/2023/05/federal-judge-no-ai-in-my-courtroom-unless-a-human-verifies-its-accuracy/; *see also* Benjamin Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT*, N.Y. TIMES (May 27, 2023), https://www.nytimes.com/2023/05/27/nyregion/avianca-airline-lawsuit-chatgpt.html.

Judicial standing orders regulating AI vary widely. Generally, judicial standing orders require that parties disclose their use of AI to the court and certify the accuracy of any documents prepared with AI technology. The most common standing orders direct attorneys to file a certificate or declaration attesting either that AI was not used in the preparation of documents filed on the court's docket or, if AI was used, that the documents were verified for accuracy by a human.[18] Some standing orders mandate that attorneys disclose which AI program they used to prepare the filing.[19] Others require parties to identify which portion of the document relied upon AI-assisted drafting[20] and some mandate that attorneys retain records of the prompts and inquiries used in the generative AI tools that provided assistance in the drafting of the document.[21] Judicial standing orders often cite concerns regarding the use of AI, including generative AI's potential to provide made-up legal authority, as well as AI's tendency for biased outputs and issues relating to data privacy.[22]

Other judicial standing orders do not impose additional obligations, but rather remind parties that their obligations under generally applicable federal and ethical rules also apply to their use of AI tools.[23] For example, the U.S. District Court for the Eastern District of Texas adopted a local rule that does not require parties to sign or file a separate verification. Instead, it cautions lawyers that certain AI technologies "may produce factually or legally inaccurate content" and reminds lawyers that their "most important asset" is "the exercise of independent legal judgment."[24]

A few federal judges prohibit attorneys and self-represented litigants from using AI in any document submitted to the court and warn that parties and their counsel who violate the court's AI ban may face sanctions, including striking the AI-prepared pleading from the record, imposing economic penalties, or dismissing the lawsuit.[25] Some judges apply the AI ban to generative AI

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[18] *See e.g.*, Standing Order for Civil Cases Assigned to Judge Stanley Blumenfeld, Jr., Rule (5)(c) (C.D. Cal. Mar. 1, 2024), https://www.cacd.uscourts.gov/honorable-stanley-blumenfeld-jr; Standing Order - In Re: Artificial Intelligence ("AI") in Cases, Judge Michael M. Baylson (E.D. Pa. June 5, 2023), https://www.paed.uscourts.gov/judges-info/senior-judges/michael-m-baylson; Judge Specific Requirements, Mandatory Certification Regarding Generative Artificial Intelligence, Judge Brantley Starr (N.D. Tex. May 30, 2023), https://www.txnd.uscourts.gov/judge/judge-brantley-starr.

[19] Judge Evelyn Padin's General Pretrial and Trial Procedures, Use of Generative Artificial Intelligence ("GAI") (D. N.J. Nov. 11, 2023), https://www.njd.uscourts.gov/content/evelyn-padin.

[20] Order on Artificial Intelligence, Judge Stephen Alexander Vaden (Ct. Int'l. Trade June 8, 2023), https://www.cit.uscourts.gov/content/judge-stephen-alexander-vaden.

[21] Standing Order for Civil Cases Before District Judge Araceli Martínez-Olguín, Artificial Intelligence (N.D. Cal. Nov. 22, 2023), https://www.cand.uscourts.gov/judges/martinez-olguin-araceli-amo/; Order on Artificial Intelligence, Judge Stephen Alexander Vaden (Ct. Int'l. Trade June 8, 2023), https://www.cit.uscourts.gov/content/judge-stephen-alexander-vaden.

[22] Mandatory Certification Regarding Generative Artificial Intelligence, Judge Brantley Starr (N.D. Tex. May 30, 2023), https://www.txnd.uscourts.gov/judge/judge-brantley-starr; Order on Artificial Intelligence, Judge Stephen Alexander Vaden (Ct. Int'l. Trade June 8, 2023), https://www.cit.uscourts.gov/content/judge-stephen-alexander-vaden.

[23] General Order Amending Local Rules (E.D. Tex. Oct. 30, 2023), https://txed.uscourts.gov/?q=general-orders; Standing Order for Civil Cases Before Judge Rita F. Lin, Use of ChatGPT or Other Generative AI Tools (N.D. Cal. Mar. 14, 2024), https://www.cand.uscourts.gov/judges/lin-rita-f-rfl/.

[24] Civ. L.R. 11(g), AT-3(m) (E.D. Tex.), https://txed.uscourts.gov/?q=civil-rules.

[25] *See e.g.*, Standing Order on the Use of Generative AI, Judge Christopher A. Boyko (N.D. Ohio, Dec. 19, 2023), https://www.ohnd.uscourts.gov/content/judge-christopher-boyko (specifying the standing order "does not apply to

tools only, whereas other judges do not have any limitations on the prohibition against the use of AI by attorneys and litigants.[26]

Many federal circuits are considering AI-specific rules or are forming AI committees. In November 2023, the U.S. Court of Appeals for the Fifth Circuit became the first federal circuit court to propose a rule addressing the use of AI in litigation.[27] The proposed rule would require lawyers to certify either that no generative AI program was used in any court filing or, to the extent a generative AI program was used, all citations and legal analysis have been reviewed for accuracy and approved by a human.[28] Violation of the rule could result in the court striking the document and sanctions against the attorney who filed it. The Fifth Circuit has not yet promulgated the rule. Other federal circuit courts, including the Ninth and Third Circuits, have convened AI committees in 2024 to consider appropriate uses of AI technology and potential rules regulating the use of AI in legal proceedings.[29] The Fourth and Second Circuits are also discussing AI issues, but have not established AI committees.[30]

Not all judges and lawyers believe that the recent advancements in AI, including the emergence of generative AI chatbots, require that courts adopt new rules.[31] Some judges posit that a patchwork of judicial standing orders regulating AI may discourage the legitimate use of AI tools by lawyers and self-represented litigants. Others argue that certain judicial standing orders define AI too broadly and without specificity, likely sweeping in commonly used software tools like Grammarly or Google translate into their purview, causing confusion among lawyers and litigants as to what tools may be used.[32]

Opponents of AI-specific court rules point to existing federal rules – such as, Rule 11 of the Federal Rules of Civil Procedure, which broadly regulates the conduct of parties and attorneys

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information gathered from legal search engines, such as Westlaw or LexisNexis, or Internet search engines, such as Google or Bing); Standing Order VI, Judge Michael J. Newman (S.D. Ohio July 14, 2023), https://www.ohsd.uscourts.gov/FPNewman (same); Self-Represented Litigants Use of Generative Artificial Intelligence (E.D. Mo. Aug. 23, 2023), https://www.moed.uscourts.gov/self-represented-litigants-srl (restricting only *pro se* litigants from using generative AI in any document filed with the court).

[26] *See id.*; *see also* Memorandum of Law Requirements (N.D. Ill. Mar. 21, 2024), https://www.ilnd.uscourts.gov/PrintContent.aspx?cmpid=626 (prohibiting parties from using "Artificial Intelligence to draft their memoranda or as authority to support their motions.").

[27] Nate Raymond, *US appeals court proposes lawyers certify review of AI use in filings*, REUTERS (Nov. 22, 2023), https://www.reuters.com/legal/transactional/us-appeals-court-proposes-lawyers-certify-review-ai-use-filings-2023-11-22/.

[28] Notice of Proposed Amendment to 5th Cir. R. 32.3, https://www.txnd.uscourts.gov/news/request-comments-proposed-amendment-fifth-circuit-rule-323-and-form-6.

[29] Nate Raymond & Sara Merken, *Two US appeals courts form committees to examine AI use*, REUTERS (Jan. 25, 2024), https://www.reuters.com/legal/government/9th-circuit-forming-committee-examine-ai-use-court-2024-01-25/.

[30] *Id.*

[31] Maura R. Grossman, Paul W. Grimm, & Daniel G. Brown, *Is Disclosure and Certification of the Use of Generative AI Really Necessary*, 107 JUDICATURE 67, 71-72 (2023); David Lat, *AI Use in Law Practice Needs Common Sense, Not More Court Rules*, BLOOMBERG LAW (Feb. 28, 2024), https://news.bloomberglaw.com/us-law-week/ai-use-in-law-practice-needs-common-sense-not-more-court-rules.

[32] Isha Marathe, *4 Generative AI Issues That Are Likely Keeping Judges Up at Night*, LEGALTECH NEWS (Aug. 10, 2023), https://www.law.com/legaltechnews/2023/08/10/4-generative-ai-issues-that-are-likely-keeping-judges-up-at-night/.

in civil litigation, and Rule 26(g) of the Federal Rules of Civil Procedure, which applies to parties' conduct during civil discovery – and other ethical rules promulgated by states as sufficient to regulate lawyers' and self-represented litigants' use of AI.[33] For example, Rule 11 requires that any pleading, written motion, or other paper filed with the court by an attorney or self-represented litigant contain "legal contentions" that "are warranted by existing law" and "factual contentions" that "have evidentiary support."[34] Individuals who violate Rule 11 may face sanctions.[35] Similarly, existing state ethical rules impose upon lawyers a duty of competence, diligence, and honesty, requiring attorneys to ensure the accuracy and reliability of documents filed with the court.[36] In addition, many judicial districts also have local rules further enumerating attorneys' duties to conduct themselves with candor and honesty before the court.[37]

Some judges hypothesize that existing federal, state, and local ethical rules are flexible enough to sanction parties who fail to check the accuracy of materials produced by generative-AI tools. Indeed, one federal judge sanctioned an attorney under Rule 11 for submitting a brief with "non-existent judicial opinions with fake quotes and citations created by the artificial intelligence tool ChatGPT" and continuing to "stand by the fake opinions after judicial orders called their existence into question."[38] Similarly, in March 2024, a Ninth Circuit panel struck a parties' opening brief pursuant to Federal Rule of Appellate Procedure 28(a)(8)(A) and Ninth Circuit Rule 28-1 because the brief contained inaccurate citations, relied on apparently fabricated cases, and misrepresented numerous case citations.[39]

U.S. judges hold many different perspectives regarding how AI in legal proceedings should be regulated. Accordingly, the federal judiciary will continue to evaluate what rule changes are needed, if any, to adapt and respond to the rapidly changing developments in AI technology.

c) Does the use of AI impact the handling of evidence?

Federal courts are continuing to study and consider how AI may impact the handling of evidence. As AI technologies become more ubiquitous in different aspects of daily life, judges will likely need to resolve evidentiary issues presented by AI in civil litigation and criminal trials.[40]

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[33] Grossman, Grimm, & Brown, *supra* note 31, at 74–75.

[34] Fed. R. Civ. P. 11(b)(2), (4).

[35] Fed. R. Civ. P. 11(c).

[36] Many states have adopted a form of the American Bar Association Model Rules of Professional Conduct. *See* MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR. ASS'N 2024) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(1) (AM. BAR. ASS'N 2024) ("A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.").

[37] *See e.g.*, S.D. Cal. Civ. L.R. 2.1(a)(2)(g) ("We expect lawyers to discourage and refuse to accept a role in litigation that is meritless . . . .), N.D. Cal. Civ. L.R. 11-4(a)(4) ("Every member of the bar of this Court and any attorney permitted to practice in this Court under Civil L.R. 11 must . . . [p]ractice with the honesty, care, and decorum required for the fair and efficient administration of justice").

[38] *Mata v. Avianca, Inc.*, No. 22-CV-1461 (PKC), 2023 WL 4114965, at *1 (S.D.N.Y. June 22, 2023).

[39] *Grant v. City of Long Beach*, 96 F.4th 1255 (9th Cir. 2024).

[40] *See generally* Paul W. Grimm, Maura R. Grossman & Gordon V. Cormack, *Artificial Intelligence as Evidence*, 19 NW. J. TECH. & INTELL. PROP. 9, 13 (2021).

Accordingly, judges will need to apply the existing Federal Rules of Evidence and their state equivalents to determine whether and when AI evidence is authentic and admissible in court.

Some judges are concerned that AI could be used to alter or manufacture evidence. "Deepfakes," which combine archival video and audio footage with AI technology to produce a new fabricated video with the subject doing or saying whatever the creator wants, are of particular concern.[41] A litigant may allege a particular piece of evidence is a "deepfake" and seek to exclude it from evidence or raise the issue to sow seeds of doubt in the mind of the jury. Federal Rule of Evidence 702 "make[s] clear that highly technical evidence, such as that involving [generative AI] and deepfakes, create an enhanced need for trial judges to fulfill their obligation to serve as gatekeepers . . . to ensure that only sufficiently authentic, valid, reliable—and not unfairly or excessively prejudicial—technical evidence is admitted."[42] Thus, U.S. judges likely will need to educate themselves continually regarding the developments and changes in AI technology to fairly and appropriately adjudicate cases that involve AI evidence.

2) What are the pros and cons of having judges utilize AI?

There are numerous pros and cons of judges using AI to perform judicial functions. Early adopters of AI technologies argue that AI tools can boost productivity, increase efficiency, and improve the effectiveness of judges and their staff. Rule 1 of the Federal Rules of Civil Procedure instructs federal courts to seek the "just, speedy, and inexpensive determination of every action and proceeding." Proponents of AI posit that AI-powered tools can assist judges and their staff in advancing those goals. AI tools can make routine, tedious work less taxing, thereby freeing judges to consider more complex, case-determinative issues. For example, generative AI tools could assist judges and their law clerks in drafting orders and summarizing relevant legal authority, likely increasing the speed at which courts can render decisions and administer justice. Judges may also consider using AI tools to prepare for oral argument by inputting the parties' briefs into an AI tool and prompting it to provide a summary of the parties' arguments, relevant case law, and draft questions for counsel.

Although AI tools offer many potential benefits to judges, there are notable challenges and concerns presented with the use of AI. One of the biggest weaknesses regarding generative AI is its capacity to "hallucinate." Generative AI "hallucinations" refer to outputs that may be coherent or relevant but contain factually incorrect or fictional information. Indeed, generative AI may even "lie" about whether it fabricated information. Another pitfall of some generative AI programs is that they may be trained on limited data sets. For example, the chatbot ChatGPT was trained on data ending in 2021 so its universe of responses may be limited.[43] Judges and their staff might attempt to mitigate these issues by checking the outputs produced by a generative AI tool for

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[41] Kathryn Lehman, Scott Edson & Victoria Smith, *5 Ways to Confront Potential Deepfake Evidence in Court*, Law360 (July 29, 2019), https://www.law360.com/articles/1181306/5-ways-to-confront-potential-deepfake-evidence-in-court.

[42] Maura Grossman, Paul Grimm, Daniel Brown & Molly Xu, *The GPTJudge, Justice in a Generative AI World*, 23 Duke L. & Tech. Rev. 1, 23 (2023).

[43] OpenAI, *What is ChatGPT?*, https://help.openai.com/en/articles/6783457-what-is-chatgpt (last visited April 3, 2024).

accuracy. However, it is currently unclear whether some of the efficiencies gained by utilizing generative AI may, in fact, be lost by the need to double-check the chatbots' outputs.

Judges' use of AI tools also presents concerns regarding confidentiality, privacy, and bias. Some judges have expressed concern that entering confidential information into an AI tool may jeopardize privacy interests or certain legal privileges afforded to litigants.[44] Additionally, judges must understand and grapple with the bias embedded in many AI tools. Bias can impact AI tools in multiple places "from the inputs to the outputs of such systems, and even in the ways in which the outputs are interpreted and used by humans."[45] For example, machine-learning algorithms, which are often trained on historical data, can unintentionally perpetuate the biases they were designed to help eliminate. One well-known example is a hiring algorithm that systematically screened out female applicants because the AI-tool was trained on data using the company's existing workforce that was disproportionally male.[46] In the criminal justice context, some state court judges may use the AI-driven program Correctional Offender Management Profiling for Alternative Sanctions ("COMPAS"), which produces a risk of recidivism score on a 10-point scale, to inform their sentencing decisions.[47] Some critics argue COMPAS's predictions are unreliable and racially biased.[48]

Unique ethical issues also may arise with the judiciary's use of AI.[49] Article III of the United States Constitution vests judicial power of the United States in its federal courts and appointed judges. Accordingly, a judge who describes the facts and law of a case and prompts a generative AI tool for a decision and then adopts that decision may run afoul of the Constitution. Indeed, judicial power is vested in judges—not AI. In the words of one judge, AI "systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States . . . . 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."[50]

a) What are the possible effects of AI on the administration of justice?

The federal judiciary will continue to study the possible positive and negative effects of AI on the administration of justice. Like any new development, AI presents an initial administrative burden on the judicial system as courts take time to convene AI working groups and planning committees to address the use of AI by the judiciary, attorneys, and litigants in legal proceedings.

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[44] Order on Artificial Intelligence, Judge Stephen Alexander Vaden, (Ct. Int'l. Trade June 8, 2023), https://www.cit.uscourts.gov/content/judge-stephen-alexander-vaden; General Order No. 23-01, In Re: Pleadings Using Generative Artificial Intelligence (U.S. Bankr. Ct., W.D. Okla. July 25, 2023), https://www.okwb.uscourts.gov/general-orders.

[45] Grimm, Grossman & Cormack, *supra* note 40, at 42.

[46] Jeffrey Dastin, *Insight – Amazon scraps secret AI recruiting tool that showed bias against women*, REUTERS (Oct. 10, 2018), https://www.reuters.com/article/idUSKCN1MK0AG/.

[47] Grimm, Grossman & Cormack, *supra* note 40, at 39.

[48] *Id.* at 40.

[49] Grossman, Grimm, Brown & Xu, *supra* note 42, at 25.

[50] Mandatory Certification Regarding Generative Artificial Intelligence, Judge Brantley Starr (N.D. Tex. May 30, 2023), https://www.txnd.uscourts.gov/judge/judge-brantley-starr.

Proponents argue that AI technologies will help the federal judiciary function and administer justice more efficiently. For judges and their law clerks, generative AI tools have the potential to reduce the burden associated with time-consuming tasks such as legal research and writing. Furthermore, AI tools may also be used to gain efficiencies in other areas of court administration, including human resource and information technology departments. For example, courts may consider using AI tools designed to facilitate talent acquisition, hiring and onboarding processes, or staff retention.

Additionally, some judges and lawyers argue that advances in AI technologies, particularly generative AI tools like ChatGPT and Google BARD, have the potential to narrow the access to justice gap.[51] Generative AI chatbots can assist self-represented litigants in finding answers to their legal questions, drafting legal documents, and considering legal strategies and potential outcomes without incurring the cost of hiring an attorney. While these tools may reduce the time and expertise necessary to draft legal documents, some judges fear that self-represented litigants' newfound reliance on generative AI chatbots to produce legal filings may result in a boom of vexatious lawsuits that could flood the court system.[52] Some worry that court dockets may become overwhelmed with lawsuits replete with filings filled with nonexistent cases that judges and their clerks must wade through, slowing down the efficient administration of justice. To mitigate these issues, some courts are working on AI guides that will assist self-represented litigants in their use of generative AI tools and warn them about the potential pitfalls of relying on generative AI tools for legal advice, including the tools' ability to cite erroneous legal authority.

b)   What are the possible effects of AI on judicial independence?

The federal judiciary will continue to monitor how AI tools may impact judicial independence. In his year-end report, Chief Justice Roberts of the U.S. Supreme Court opined that the use of AI to render judicial decisions may "dehumaniz[e] the law."[53] For example, a judge who relies upon an AI tool's recommendation for sentencing a criminal defendant may impose a harsher sentence or unknowingly incorporate the biases embedded in the AI tool.[54] "Studies show a persistent public perception of a 'human-AI fairness gap,' reflecting the view that human adjudications, for all of their flaws, are fairer than whatever the machine spits out."[55] This is likely the case because AI tools generally will not make values-based, ethical decisions unless specifically trained to do so.[56] Increased reliance on AI to render case outcomes may also create more uniformity in judicial decisions, resulting in less judicial independence.

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[51] *Roberts' Year End Report* at 3; Rodriguez, *supra* note 1, at 814.

[52] Grossman, Grimm, Brown & Xu, *supra* note 42, at 21–22.

[53] *Roberts' Year End Report* at 3.

[54] *See* Julia Dressel & Hany Farid, *The accuracy, fairness, and limits on predicting recidivism*, 4 SCIENCE ADVANCES (Jan. 17, 2018).

[55] *Roberts' Year End Report* at 6.

[56] BAKER, *supra* note 2, at 9–10.

Some judges have stated that they will avoid using AI in their work, specifically citing concerns regarding perceptions of judicial independence.[57] One federal judge who has adopted AI rules for litigants appearing before him has stated that he does not "want anyone to think that there's an algorithm out there that is deciding their case."[58]

3)   Should there be limits on the use of AI by judges, and, if so, to what extent?

Federal courts are conducting additional research on what limits should be placed on judges' use of AI technologies. Indeed, judges must soon decide to what extent, if any, they should rely on generative AI tools to inform their decisions. However, U.S. judges generally agree that AI tools should not supplant independent judicial judgment or discretion. AI technology may propose ideas and even assist in legal research and drafting; but it cannot, and should not, decide case outcomes. Federal courts will continue to evaluate what limits may be necessary to properly balance the benefits and risks associated with the use of AI by judges.

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[57] Jacqueline Thomsen, *US judge orders lawyers to sign AI pledge, warning chatbots 'make stuff up'*, REUTERS (June 2, 2023), https://www.reuters.com/legal/transactional/us-judge-orders-lawyers-sign-ai-pledge-warning-they-make-stuff-up-2023-05-31/.
[58] *Id.*