COMMENTS

The Fifth Circuit Tackles the Growth of Artificial Intelligence in the Legal Profession

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I.   INTRODUCTION

The practice of law has changed drastically over the past two centuries due to the growth and advancement of technology.[1] Each new technology has transformed how attorneys practice, from the mechanical writing process via typewriters in 1867 to word processing and computerized legal research in the 1980s to mobile devices in the late 2000s.[2] The transition to computerized legal research on Westlaw and LexisNexis was a significant advancement, increasing efficiency while decreasing costs due to reduced need for library space.[3] Today, these

    1.   Nicole Black, *10 Technologies that Changed the Practice of Law*, MYCASE (July 29, 2014), https://perma.cc/SRT5-A6QS.
    2.   *Id.*
    3.   *Id.*

internet resources lead the legal research market and are utilized by law students, attorneys, judges, and other legal professionals.[4] While these services have made legal research "faster, easier, and more accurate than ever," they have led to a predicament regarding the reliability of research results.[5] As Leann Blanchfield, head of the editorial department at Thomson Reuters, has stated, "In light of everything that's out there, how can you have the confidence that you have found everything you are looking for?"[6]

Blanchfield's concern has been further complicated by the emergence of artificial intelligence (AI). In 2013, Richard Susskind predicted that AI would bring "radical" change to the legal profession in the next decade.[7] His prediction has materialized. In 2019, the ABA Legal Technology Survey reported that only eight percent of respondents were using resources with AI.[8] Just one year later, LexisNexis released their AI-backed "legal research solution," Lexis+.[9] Currently, AI has become a substantial part of legal research, particularly as Westlaw recently released Westlaw Precision, which provides generative AI technology to assist legal professionals with research.[10] Other forms of generative AI, such as ChatGPT, CoCounsel, and Harvey, have expanded into key tools for legal research.[11] According to a survey conducted in early 2024, the percentage of legal professionals using generative AI surged to forty-six percent.[12] Among those respondents who indicated that they use generative AI in their practice, fifty-seven percent stated that they use it for general legal research, forty-six percent for drafting communication,

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4.   David Lat, *How Artificial Intelligence Is Transforming Legal Research*, Above the Law (2020), ishttps://abovethelaw.com/law2020/how-artificial-intelligence-is-transforming-legal-research/.

5.   *Id.* at 7.

6.   *Id.* (noting that Thomson Reuters owns Westlaw).

7.   Samuel Maireg Biresaw & Abhijit Umesh Saste, *The Impacts of Artificial Intelligence on Research in the Legal Profession*, 5 Int'l J. L. and Soc'y 53, 57 (2022).

8.   *The Power of Artificial Intelligence in Legal Research*, LexisNexis (May 16, 2023), https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/the-power-of-artificial-intelligence-in-legal-research.

9.   *Id.*

10.   *Introducing AI-Assisted Research: Legal Research Meets Generative AI*, Thomson Reuters, https://legal.thomsonreuters.com/blog/legal-research-meets-generative-ai/.

11.   Cem Dilmegani, *Generative AI Legal Use Cases & Examples in 2024*, AI Multiple Research (Jan. 3, 2024), https://research.aimultiple.com/generative-ai-legal/#easy-footnote-bottom-2-65792.

12.   Stephanie Pacheco, *ANALYSIS: Legal Workers Use AI for Research, Despite Red Flags*, Bloomberg Law (Apr. 4, 2024), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-legal-workers-use-ai-for-research-despite-red-flags.

and twenty-six percent for drafting legal contracts.[13] By 2026, the global AI legal technology market is projected to exceed $37 billion.[14]

As a result of the notable growth of artificial intelligence in the legal industry, the U.S. Court of Appeals for the Fifth Circuit proposed an amendment to Rule 32.3 compliance, which requires attorneys to verify that their documents were either not composed with generative AI or that any material generated by AI was subject to human review.[15] There has been an array of commentary regarding the proposed rule change from attorneys and judges within the Fifth Circuit. Some have concerns that the rule may impede the advantages of artificial intelligence, while others argue that all applications of AI in court documents should be eliminated.[16]

Artificial intelligence has been created, developed, and applied within the legal industry to enable attorneys to expedite their work and devote more time to higher-level tasks, negotiations, and client counseling.[17] In Part I, this Comment discusses the growth of various artificial intelligence legal tools, as well as the benefits and potential risks they bring to the law profession. Part II analyzes recent judicial actions concerning the use of AI and will further examine the Fifth Circuit's proposed rule change and the manner in which individual judges have addressed AI usage within their courts. Finally, Part III discusses the future implications of AI usage in the legal profession.

A. The Growth and Benefits of Artificial Intelligence in the Legal Profession

AI offers attorneys an opportunity to enhance their efficiency in tasks such as searching, generating documents and briefs, and developing arguments.[18] This is because AI is "a system based on algorithms and self-learning guided by machine learning and deep learning, which can

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13. *Id.*

14. Bill4Time, *7 Legal Technology Trends for a Successful 2022*, The Nat'l L. Rev. (Jan. 5, 2022), https://www.natlawreview.com/article/7-legal-technology-trends-successful-2022.

15. U.S. 5th Cir., Notice of Proposed Amendment to 5th Cir. R. 32.3 (Jan. 4, 2024), https://www.ca5.uscourts.gov/docs/default-source/default-document-library/public-comment-local-rule-32-3-and-form-6.

16. Lauren Berg, *Attys Split on 5th Circ.'s Proposed AI, Accuracy-Check Rule*, Law360 (Jan. 30, 2024), https://www.law360.com/articles/1791927/attys-split-on-5th-circ-s-proposed-ai-accuracy-check-rule.

17. *The Power of Artificial Intelligence in Legal Research*, LexisNexis (May 16, 2023), https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/the-power-of-artificial-intelligence-in-legal-research.

18. Biresaw & Saste, *supra* note 7.

180   *TUL. J. TECH. & INTELL. PROP.*   [Vol. 27

perform certain human cognitive capabilities by interacting with the environment through sensors, processing information, and adopting decisions and taking actions, with a certain degree of autonomy."[19]

There are two main types of AI: extractive and generative.[20] Extractive AI involves algorithms that extract pertinent data points from data it has previously encountered.[21] This type of AI is valuable because it can gather extensive information and organize it in a clear way, making it easy to reference the original source.[22] Examples of this type of AI in practice include LexisNexis's Answers, Brief Analysis, and Fact & Issue Finder.[23]

Generative AI uses its extensive knowledge acquired from a large database to generate original content specifically tailored to the parameters outlined in the prompt.[24] In practice, generative AI can be utilized for compliance and regulatory monitoring, contract analysis and negotiation, document drafting, ensuring due diligence in corporate transactions, intellectual property management, legal research, and legal chatbots.[25] A prominent language model of generative AI, GPT-4, has even successfully passed the bar examination, ranking within the top tenth percentile.[26]

The landscape of generative AI technologies is expanding as established legal information services and start-ups venture into the AI legal domain. In 2023, Thomson Reuters acquired Casetext, a company that created AI technology for legal professionals, and introduced the first AI legal assistant, CoCounsel.[27] Recently, vLex and Fastcase merged into vLex Group, aiming to challenge to Westlaw and Lexis in the race for

19. *Id.*

20. *AI Terms for Legal Professionals: Understanding What Powers Legal Tech*, LEXISNEXIS (Mar. 20, 2023), https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/ai-terms-for-legal-professionals-understanding-what-powers-legal-tech.

21. *Id.*

22. Jason Dougal, *Forget ChatGPT—Extractive AI Is the Real Game-Changer for Teachers, Students*, THE74 (Nov. 8, 2023), https://www.the74million.org/article/forget-chatgpt-extractive-ai-is-the-real-game-changer-for-teachers-students/.

23. *AI Terms for Legal Professionals: Understanding What Powers Legal Tech, supra* note 20.

24. *Evolution of Legal AI from Extractive to Generative—The CaseMine Story*, BAR AND BENCH (Jan. 9, 2024), https://www.barandbench.com/news/evolution-of-legal-ai-from-extractive-to-generative-the-casemine-story.

25. Dilmegani, *supra* note 11.

26. *Id.*

27. *Thomson Reuters Acquires Legal AI Firm Casetext for $650 Million*, ORRICK (June 27, 2023), https://www.orrick.com/en/News/2023/06/Thomson-Reuters-Acquires-Legal-AI-firm-Casetext-for-650-million.

legal research superiority.[28] Their platform includes Vincent, "an AI-powered legal research assistant that analyzes legal documents that users upload and finds relevant search results."[29]

Lexis+ AI also offers features like conversational searching, drafting, summarization, document analysis, and linked legal citations.[30] In response, Westlaw Edge now equips legal professionals with its own AI natural language searching.[31] The main focus of Westlaw Edge is to present searchers with relevant documents, provide suggested answers to numerous blackletter law inquiries, and recommend related research questions.[32] Westlaw's "Litigation Analytics" tool aids attorneys in predicting a judge's potential ruling, estimating how long a decision may take, and offering various data and considerations that could influence a litigation strategy.[33] This comprehensive data can enhance confidence in securing a favorable ruling.[34] Westlaw has also introduced the KeyCite Overruling Risk feature, which extends beyond the traditional KeyCite tool by highlighting potential issues with cases.[35] KeyCite Overruling Risk goes further than the traditional Shepard's report (Lexis) or Keycite flag, as it identifies possible cases that may have been implicitly invalidated rather than focusing only on those that have been directly overruled.[36]

While Lexis and Westlaw have traditionally dominated the market, other start-up companies have emerged. Spellbook, used by over 1,700 legal teams, leverages GPT-4 to review and recommend language for contracts and legal documents in Microsoft Word.[37] Carbon Chemistry's COO vouches for the program, claiming it has reduced the time needed to draft contracts by ninety percent.[38] Ironclad Contract AI (CAI), said to

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28. Bob Ambrogi, *In Major Legal Tech Deal, vLex and Fastcase Merge, Creating a Global Legal Research Company, Backed by Oakley Capital and Bain Capital*, LAWNEXT (Apr. 4, 2023), https://www.lawnext.com/2023/04/in-major-legal-tech-deal-vlex-and-fastcase-merge-creating-a-global-legal-research-company-backed-by-oakley-capital-and-bain-capital.html.

29. *Id.*

30. *Lexis+AI: Transform Your Legal Work*, LEXISNEXIS, https://www.lexisnexis.com/en-us/products/lexis-plus-ai.page.

31. Lat, *supra* note 4.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Basic Legal Research*, NORTHERN ILLINOIS UNIVERSITY COLLEGE OF LAW DAVID C. SHAPIRO MEMORIAL LAW LIBRARY, https://libguides.niu.edu/c.php?g=425200&p=2904736.

37. *Spellbook*, SPELLBOOK LEGAL, https://www.spellbook.legal/contract-drafting-ai.

38. *Draft Contracts 10x Faster with AI*, SPELLBOOK, https://www.spellbook.legal/contract-drafting-ai-3.

be the world's first AI contract assistant, was built to speed up contract turnaround time through automatic suggestions, automatic data extraction, and complex contract issue solution generation.[39] The CEO claims CAI can "comb through a corpus of contracts and do the reasoning required to answer almost any contract-related question—showing you the steps it took to reach that conclusion—and handing that analysis back to your legal team."[40] CAI's abilities can transform how attorneys analyze contracts and budget their time.[41]

Harvey AI is another start-up platform that has garnered interest in the law firm community. OpenAI was an early investor in the platform, which is adapted from OpenAI's ChatGPT software.[42] Harvey was built using general data found on the internet, trained with general legal data including case law, and then further trained using the law firm's work product and templates.[43] Harvey has been tested and put to use since 2022 by Allen & Overy, a global law firm with 3,500 attorneys.[44] The firm has promoted Harvey, stating that the platform can assist with "contract analysis, due diligence, litigation, and regulatory compliance."[45] While the firm has shown confidence in Harvey's use, they have also recognized that their lawyers need to carefully review Harvey's output.[46] Despite the need for review, Allen & Overy has found great use to the platform, with partners calling it a "game-changer" that "can save lawyers 'a couple hours a week-plus.'"[47] These various platforms have become important resources for attorneys, paralegals, and judges in improving time efficiency for legal research, contract analysis, and document drafting.[48]

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39.   *Introducing Ironclad CAI*, IRONCLAD, https://ironcladapp.com/product/ironclad-contract-ai/.

40.   *Introducing Ironclad Contract AI, a Paradigm Shift for Contract Analysis*, PR NEWSWIRE (Sept. 7, 2023), https://www.prnewswire.com/news-releases/introducing-ironclad-contract-ai-a-paradigm-shift-for-contract-analysis-301921202.html.

41.   *Id.*

42.   Debra Cassens Weiss, *Meet Harvey, BigLaw Firm's Artificial Intelligence Platform Based on ChatGPT*, ABA J. (Feb. 17, 2023), https://www.abajournal.com/news/article/meet-harvey-biglaw-firms-artificial-intelligence-platform-based-on-chatgpt/.

43.   Kate Rattray, *Harvey AI: What We Know So Far*, CLIO, https://www.clio.com/blog/harvey-ai-legal/.

44.   Weiss, *supra* note 42.

45.   *A&O Announces Exclusive Launch Partnership with Harvey*, ALLEN & OVERY (Feb. 15, 2023), https://www.allenovery.com/en-gb/global/news-and-insights/news/ao-announces-exclusive-launch-partnership-with-harvey.

46.   *Id.*

47.   *Id.* Weiss, *supra* note 42.

48.   Stephen Embry, *Generative AI in Legal Research: Opportunities and Risks*, ONE LEGAL (Feb.21, 2024), https://www.onelegal.com/blog/legal-generative-ai/.

B. Risks of Artificial Intelligence Use

Due to the precise nature of the legal profession, there are multiple risks associated with using AI in legal research and writing. The first serious risk of using generative AI is the possibility of "hallucinations."[49] AI models are programmed to provide the most plausible result, even if it is not the most accurate.[50] Beyond nonexistent content, AI can misinterpret real cases and existing content to fit the purpose of a specific citation.[51] Such issues have increased the risk of making misrepresentations to the court.[52] These two concerns stem from a lack of fine-tuned data in the AI model; as models receive more legal-specific data, occurrences of hallucinations and inaccuracies should decline.[53] This has been observed with Harvey AI, which has reduced contract review hallucinations to achieve a lower error rate than that of reviews conducted by contract attorneys.[54] Even without more fine-tuned data, there are steps to reduce hallucinations on the user's part.[55] When using generative AI for legal research, attorneys should: (1) avoid asking the AI to contradict other facts, (2) include important information and facts at the beginning or end of the prompt, rather than in the middle, (3) provide feedback to the AI tool, which can help lower future errors, and, (4) if possible, lower the "temperature" of the AI, reducing creativity and randomness in responses.[56]

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49. *Id.* Hallucinations are the "inclusion of content, references, or citations in responses that simply don't exist."

50. *Id.*

51. *Id.*

52. Michael Legg & Vicki McNamara, *AI Is Creating Fake Legal Cases and Making Its Way into Real Courtrooms, with Disastrous Results*, The Conversation (Mar. 12, 2024), https://theconversation.com/ai-is-creating-fake-legal-cases-and-making-its-way-into-real-courtrooms-with-disastrous-results-225080.

53. *The Key Legal Issues Relating to the Use, Acquisition, and Development of AI*, Thomson Reuters (Mar. 1, 2024), https://legal.thomsonreuters.com/blog/the-key-legal-issues-with-gen-ai/.

54. Bob Ambrogi, *As Allen & Overy Deploys GPT-Based Legal App Harvey Firmwide, Founders Say Other Firms Will Soon Follow*, LawNext (Feb. 17, 2023), https://www.lawnext.com/2023/02/as-allen-overy-deploys-gpt-based-legal-app-harvey-firmwide-founders-say-other-firms-will-soon-follow.html.

55. Siddartha Rao & Andrew Ramstad, *Legal Fictions and ChatGPT Hallucinations: 'Mata v. Avianca' and Generative AI in the Courts*, Law.com (Dec. 21, 2023), https://www.law.com/newyorklawjournal/2023/12/21/legal-fictions-and-chatgpt-hallucinations-mata-v-avianca-and-generative-ai-in-the-courts/?slreturn=20240312114036.

56. *Id.*

184   *TUL. J. TECH. & INTELL. PROP.*   [Vol. 27

Another area of potential risk is bias.[57] This is because the data an AI model learns from could have been programmed by biased individuals.[58] The training data may favor certain voices or exclude individuals based on gender, sex, or age, skewing the output.[59] This was seen in 2016, when Microsoft AI chatbot, Tay, began posting racist and antisemitic messages on X (then Twitter) after interacting with users.[60]

The greatest input risk is a possible breach of confidentiality.[61] Confidential information should not be entered into public AI models such as ChatGPT.[62] However, platforms like Harvey AI can improve their efficiency and meet specific firm needs due to their ability to train the model on the firm's private data.[63] To maintain confidentiality, a Harvey model trained on a specific firm's data is not used as a base model for a Harvey model at a different firm.[64] Even within a firm, Harvey can support different models that are firewalled from each other to prevent the "leakage" of client matters.[65] For programs other than Harvey, licensing agreements with strict confidentiality provisions can help protect firm data.[66] While confidentiality remains a great risk to private data, the most significant issue facing the courts at this time is the risk of hallucinations and other inaccuracies from generative AI, resulting in precedents on sanctions and court rules.[67]

II.   THE AI EFFECT

As the use of artificial intelligence has grown, courts have begun to address the substantial changes in how legal research and work products are produced. Misrepresentations to the courts have led to AI-specific rule changes and proposals at multiple levels of the judicial system.

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57.   Ambrogi, *supra* note 54.

58.   *Id.*

59.   Rao & Ramstad, *supra* note 55.

60.   *Id.*

61.   *Id.*

62.   *Id.*

63.   *Harvey AI Legal: What It Is & How It Is Working*, WAIP (Feb. 26, 2024), https://wideaiprompts.com/how-to-use-harvey-ai/.

64.   Ambrogi, *supra* note 54.

65.   *Id.*

66.   *The Key Legal Issues Relating to the Use, Acquisition, and Development of AI*, *supra* note 53.

67.   Berg, *supra* note 15.

A.   Artificial Intelligence Falls Short in Court

Although artificial intelligence can be useful, it cannot be fully relied upon.[68] DoNotPay (DNP), an AI-driven online subscription legal service, "is not licensed to practice law and does not employ licensed attorneys."[69] Nonetheless, DoNotPay provides a range of legal services across various practice areas, branding itself as "'The World's First Robot Lawyer.'"[70] DNP's business model has proven successful, reportedly "overturn[ing] $4 million in parking ticket fines."[71] By 2021, DNP had approximately 250,000 subscribers and by 2023, it had processed over 2 million cases.[72] DNP was even preparing to introduce its service in the courtroom until state prosecutors issued warnings that halted those efforts.[73] CEO Joshua Browder tweeted that he could face six months in jail if he followed through with the plans.[74] Even without a courtroom presence, MillerKing, LLC (MK) made several claims against DNP, including assertions that the service damaged the firm's reputation, diminished its goodwill, and led to harm through lost clients.[75]

While the statistics indicate a well oiled machine, negative consumer feedback showed that the robot lawyer lacked reliability.[76] Examples of lackluster representation included DNP's failure to dispute parking tickets, the creation of inadequate legal documents, and entering inaccurate form information.[77] MK noted that the mistakes could leave DNP subscribers vulnerable to criminal or civil liability.[78] DNP decided to remove those specific services from the platform, but continued to offer

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68.   Lee Raine et al., *Experts Doubt Ethical AI Design Will Be Broadly Adopted as the Norm Within the Next Decade*, Pew Rsch. Ctr. (June 16, 2021), https://www.pewresearch.org/internet/2021/06/16/1-worries-about-developments-in-ai/.

69.   MillerKing, LLC v. DoNotPay, Inc., No. 3:23-CV-863-NJR, 2023 WL 8108547, at *2 (S.D. Ill., Nov. 17, 2023).

70.   *Id.* DoNotPay's legal services included "marriage annulment, speeding ticket appeals, canceling timeshares, breaking leases, breach of contract disputes, defamation demand letters, copyright protection, child support payments, restraining orders, revocable living trusts, and standardized legal documents."

71.   *Id.*

72.   *Id.* at 2-3.

73.   *Id.* at 3.

74.   Emma Roth, *DoNotPay Chickens Out on Its Courtroom AI Chatbot Stunt*, The Verge (Jan. 25, 2023), https://www.theverge.com/2023/1/25/23571192/donotpay-robot-lawyer-courtroom.

75.   *MillerKing*, 2023 WL 8108547, at *3-4.

76.   *Id.* at *3.

77.   *Id.*

78.   *Id.*

and advertise other legal services.[79] DoNotPay won the case at hand, with the court holding that DNP was not a direct competitor of the law firm, as their services differed in scope.[80] This ruling reinforced the notion that AI cannot stand alone as a reliable legal advisor, underscoring the significant divide between ABA-licensed attorneys and artificial intelligence.

Despite this gap, some attorneys have relied on AI for their court document needs. In April 2023, a Colorado attorney, Zachariah Crabill, used ChatGPT-generated case law to prepare a motion to set aside judgment in his client's case.[81] Crabill, however, never attempted to verify whether the citations were accurate.[82] After discovering the cases were fictitious, he failed to inform the court or withdraw his motion before placing the blame on a legal intern.[83] Consequently, Crabill received a ninety-day suspension and two years' probation, confirming that his actions constituted professional misconduct.[84] This would not be the last time artificial intelligence produced fake citations that would be used in court proceedings.

B. Mata v. Avianca

In New York, a passenger's damages suit against an air carrier was turned upside down when the plaintiff's attorneys filed an affirmation in opposition filled with nonexistent judicial opinions, including fake quotes and citations, that were created by ChatGPT.[85] Opposing counsel found seven cited decisions in the submission that could not be located.[86] The attorney in charge of the submission's research and writing, Mr. Schwartz, believed that ChatGPT could not fabricate or make up cases.[87] His logic behind this false perception was perplexing to the court, as he admitted he was only able to authenticate two of the cases from ChatGPT on Fastcase, a free website that shows the judicial decisions of citations entered.[88] Mr. Schwartz testified that he could not find the full decision to "Varghese," one of the seven fake cases, but cited it in the brief to the

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79. *Id.*
80. *Id.* at *8. MK could appear in court, represent clients, and sign documents while DNP could only provide virtual services.
81. People v. Crabill, 23PDJ067, 2023 WL 8111898, at *1 (Colo. O.P.D.J., Nov. 22, 2023).
82. *Id.*
83. *Id.*
84. *Id.*
85. Mata v. Avianca, Inc., 678 F. Supp. 3d 443, 449-51 (S.D. N.Y., June 22, 2023).
86. *Id.* at 450.
87. *Id.* at 451.
88. *Id.* at 457.

court anyway.[89] He stated that he used ChatGPT only to supplement his research, but ChatGPT was in fact the only source for his arguments.[90] The error was compounded when Mr. Schwartz did not attempt to withdraw the affirmation after opposing counsel's initial reply stated that they could not find seven of the cited cases.[91]

The Court found numerous issues regarding the behavior of the respondents.[92] The Court assessed the attorneys' conduct under Rule 11 of the Federal Rules of Civil Procedure (FRCP), which allows for a court to "sanction an attorney for misrepresenting facts or making a frivolous legal argument."[93] An argument may be frivolous when it constitutes an "abuse of the adversary system."[94] A lack of necessary care when preparing documents for court filing is considered an "abuse of the judicial system" and is subject to Rule 11 sanctions.[95] The Court stated, "an attempt to persuade a court or oppose an adversary by relying on fake opinions is an abuse of the adversary system."[96] The respondents' failure to correct their previous filings also violated Rule 3.3(a)(1) of the New York Rules of Professional Conduct.[97] The respondents' firm was also held jointly responsible for the violations under FRCP Rule 11(c)(1).[98]

For a court to sanction an attorney, it must establish a finding of bad faith.[99] The Court determined that Mr. Schwartz acted in subjective bad faith, recognizing that both the opposing counsel and the Court could not find the cases he cited. Despite this, he did not withdraw his brief.[100] Additionally, he was dishonest regarding the degree to which he utilized ChatGPT in his research.[101] Overall, the respondents neglected their duties as attorneys.[102]

The Court in *Mata* emphasized the harms that result from submitting fake opinions.[103] These included wasting the time and money of the

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89. *Id.* at 451.
90. *Id.* at 457.
91. *Id.* at 450.
92. *See generally Mata*, 678 F. Supp. 3d.
93. *Id.* at 459. (citing Muhammad v. Walmart Stores East, L.P., 732 F. 3d 104, 108 (2d Cir. 2013)).
94. *Id.* at 460. (citing Salovaara v. Eckert, 222 F. 3d 19, 34 (2d Cir. 2000)).
95. *Id.* at 460 (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 398 (1990)).
96. *Id.* at 461. (citing *Salovaara*, 222 F.3d at 34).
97. *See id.* at 460.
98. *Id.* at 465.
99. *Id.* at 462.
100. *Id.* at 450.
101. *Id.* at 465.
102. *Id.* at 448.
103. *Id.*

TUL. J. TECH. & INTELL. PROP.   [Vol. 27

opposing party; wasting the Court's time, which could have been allocated to other important cases; depriving the client of an honorable judicial proceeding based on authentic precedent; potentially harming courts and their reputations by being linked to a fake opinion; fostering increased distrust in the legal system; and creating an avenue for future litigants to challenge a judicial ruling doubting its authenticity.[104] In conclusion, the Court ordered sanctions against respondents and set precedent on the use of artificial intelligence in the courtroom.[105] The sanctions included: (1) sending the plaintiff copies of the sanction order, the hearing, and the affidavit submitting the fake cases; (2) sending those materials to the judges cited in the fake cases; and (3) issuing a $5,000 penalty.[106] This landmark decision soon gained national attention and led to the introduction of new court rules across multiple jurisdictions.[107]

C.   *The Fifth Circuit Sets Boundaries on the Use of AI*

Just months after the New York fiasco, the United States Court of Appeals for the Fifth Circuit proposed a change to its certificate of compliance rules (Rule 32.3) to address the use of artificial intelligence.[108] This proposed change would require attorneys to certify that documents were not written using generative AI, such as ChatGPT or, if they were, that they were reviewed by humans.[109] This verification of accuracy would be applied to all texts, including citations and legal analyses.[110]

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104.   *Id.* at 448-49.

105.   *Id.* at 449.

106.   William Ryan, et al., *Practical Lessons from the Attorney AI Missteps in* Mata v. Avianca, ASSOCIATION OF CORPORATE COUNSEL (Aug. 8, 2023), https://www.acc.com/resource-library/practical-lessons-attorney-ai-missteps-mata-v-avianca# (last visited Nov. 12, 2024).

107.   *See infra* notes 108, 140, 144, 146, and 148 and accompanying text.

108.   Berg *supra* note 16; 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.

109.   Sonja Rzepski, *US Appeals Court Proposes AI Restrictions in All Court Filings*, JURIST (Nov. 23, 2023, 10:26 AM), https://www.jurist.org/news/2023/11/us-appeals-court-proposes-ai-restrictions-in-all-court-filings/; 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.

110.   Madison Arnold, *5th Circ. Eyes Barring AI Use, Mandating Accuracy Check*, LAW360 (Nov. 22, 2023, 4:12 PM EST), https://www.law360.com/articles/1769645; "[C]ounsel . . . 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." 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.

Additionally, a "material misrepresentation" regarding the use of generative AI could result in sanctions or the tossing of the document.[111]

The Fifth Circuit released the proposed rule change in November 2023 and requested comments from the legal community on the change through January 4, 2024.[112] Attorneys and judges have offered a wide array of opinions regarding the proposed change, ranging from concerns that the rule will restrict the benefits of AI to the opposing view that AI should not be used in court documents at all.[113]

One prominent view is that the rule change was superfluous.[114] For example, New Orleans attorney Brian King argued that before AI, there were "lazy lawyers" who copied nonexistent case law into court filings, attorneys are already held to competency rules, and AI-specific court rules will "add nothing to substance."[115] Partners at Norton Rose Fulbright also agreed, due to the fact that the FRCP and Federal Rules of Appellate Procedure (FRAP) already cover an attorney's responsibility to review and verify that their court filings are accurate.[116] They wrote that the proposed rule is "unnecessary."[117] Moreover, as generative AI becomes integrated into numerous legal research tools, this rule could discourage attorneys from utilizing beneficial resources to enhance their work product.[118] Additionally, Sixth Circuit Judge John Nalbandian opined that the rule change would be a "misplaced" effort that would hinder technology that "brings the promise of the delivery of cheaper legal services to a broader swath of people who need legal assistance."[119]

Another argument against the proposed rule change revolves around the specificity of generative AI. Attorney Carolyn Elefant believes the proposed rule change unfairly targets AI-generated research despite the need for all legal research and citations to be verified.[120] We have already begun to see arguments where the specificity issue has resulted in

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111. Arnold, *supra* note 110.

112. Berg, *supra* note 108.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Nate Raymond, *Lawyers Voice Opposition to 5th Circuit's Proposed AI Rule*, Reuters (Jan. 29, 2024, 3:43 PM CST), https://www.reuters.com/legal/transactional/lawyers-voice-opposition-5th-circuits-proposed-ai-rule-2024-01-29/.

119. Nate Raymond, *US Appellate Judge Calls Bans on AI Use by Lawyers 'Misplaced'*, Reuters (Apr. 5, 2024, 1:04 PM CDT), https://www.reuters.com/legal/transactional/us-appellate-judge-calls-bans-ai-use-by-lawyers-misplaced-2024-04-05/.

120. Email from Carolyn Elefant, att'y, to clerk of Fed. Cir., Fifth Cir., (Jan 1, 2024) (on file with author).

defenses against fake AI citations. In December 2023, disbarred attorney Michael Cohen, Donald Trump's former fixer and attorney, provided his attorney with fake case citations that were generated by Google Bard.[121] His defense: He did not know that Google Bard was generative AI similar to ChatGPT and did not know that it could provide false information.[122] Either way, any "fake law" is already prohibited by ethical standards.[123] The issue of specificity is further complicated by the question of where the line is crossed between "regular" AI or research and "generative" AI.[124] What is the exact point where an attorney "uses" generative AI— does running a search without using the results or language offered count?[125] The specificity of the rule would add unnecessary complexity to an issue already governed by long-standing FRCP rules and ethical norms.[126]

Other attorneys have the contrasting view that the rule change does not go far enough. President and CEO of Carlton Fields, P.A. Gary Sasso passionately stated in an internal email to be sent to the Fifth Circuit, "This doesn't go far enough. Not even close. This is almost worse than no policy at all."[127] Sasso elaborated in his email that generative AI lacks true thinking capabilities, suggesting that its output resembles autocorrect more than legal analysis.[128] The general counsel of Carlton Fields explained their firm's stance, asserting a complete prohibition on the use of generative AI for legal product creation.[129] Attorney Alan Goldstein agreed that the proposed change does not go far enough.[130] He emphasized that the requirement for a human review of AI-generated material should instead necessitate evaluation by "an attorney admitted to practice before this court and/or someone working under their direct

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121. Nate Raymond, *Ex-Trump Fixer Michael Cohen Says AI Created Fake Cases in Court Filing*, REUTERS (Dec. 29, 2023, 4:46 PM CST), https://www.reuters.com/legal/ex-trump-fixer-michael-cohen-says-ai-created-fake-cases-court-filing-2023-12-29/.

122. *Id.*

123. Email from David Coale, att'y, to clerk of Fed. Cir., Fifth Cir., (Jan. 3, 2024) (on file with author). *See* FED. R. CIV. PRO. 11(b); TEX. DISC. R. PROF. CONDUCT 5.01; TEX. DISC. R. PROF. CONDUCT 5.03.

124. Email from David Coale, att'y, to clerk of Fed. Cir., Fifth Cir., (Jan. 3, 2024) (on file with author).

125. *Id.*

126. *Id.*

127. Email from Peter Winders, att'y, to Margaret Dufour (Nov. 27, 2023) (on file with author).

128. *Id.*

129. *Id.*

130. Email from Alan Goldstein, att'y, to Margaret Dufour (Nov. 28, 2023) (on file with author).

supervision."[131] Human review is a mere "half-measure" in comparison to review by an admitted attorney.[132]

Alternate opinions focus on AI's role in the proposed change. U.S. District Judge Xavier Rodriquez commented that the rule should be "technology neutral" in tone, and offered a modification that removed any mention of AI.[133] Attorney Carolyn Elefant found the "proposed rule unfairly targets AI," which merely exposed the long-known issue of inaccurate citations in court filings.[134] Attorney Shelby Shanks of Porter Hedges furthered opposition to the rule change's focus on AI.[135] She would rather see legal practice emphasize the "quality of legal work" instead of the tools used to produce it, as most legal research platforms have incorporated AI.[136] The subjective nature of potential applications and individual interpretations regarding specific situations may create confusion and adversely affect the Court and the parties appearing before it.[137]

There are many differing views on the proposed rule change by the Fifth Circuit.[138] As of April 2024, the Fifth Circuit has yet to announce any updates on the proposed Rule 32.3 compliance amendment or respond to comments from attorneys and judges. While the Fifth Circuit navigates its strategy for dealing with AI, other courts have started defining their own limits.[139]

D.   Artificial Intelligence Adjustments Beyond the Circuit Court

Judges are beginning to tackle artificial intelligence use in their courts. Judge Brantley Starr, United States district judge for the Northern District of Texas, requires attorneys to submit a mandatory certification regarding the use of generative AI in any filings submitted to the Court.[140]

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131.   *Id.*

132.   *Id.*

133.   Email from Xavier Rodriguez, U.S. Dist. Ct. J., to Margaret Dufour (Nov. 28, 2023) (on file with author).

134.   Email from Carolyn Elefant, att'y, to clerk of Fed. Cir., Fifth Cir., (Jan. 1, 2024) (on file with author).

135.   Email from Shelby Shanks, att'y, to Margaret Dufour (Jan. 2, 2024) (on file with author).

136.   *Id.*

137.   *Id.*

138.   Berg *supra* note 16.

139.   Jessiah Hulle, *AI Standing Orders Proliferate as Federal Courts Forge Own Paths*, Bloomberg Law (Nov. 8, 2023, 3:30 AM), https://news.bloomberglaw.com/us-law-week/ai-standing-orders-proliferate-as-federal-courts-forge-own-paths.

140.   J. Brantley Starr, *Mandatory Certification Regarding Generative Artificial Intelligence*, U.S. Dist. Ct for the N. Dist. of Tex., (May 31, 2023, 12:00 PM), https://

The certificate stresses a requirement similar to that of the Fifth Circuit rule change: Attorneys must verify that no portion of the filing was drafted by generative AI or that any AI-drafted language was reviewed for accuracy by a human before submission.[141] Why does Judge Starr insist on this certification? He explains that AI systems can exhibit hallucinations and biases, created by individuals who have not sworn to uphold the law.[142] Moreover, these platforms have "no allegiance" to clients, the rule of law, or the United States Constitution.[143]

Following Judge Starr's mandatory certification, the U.S. Bankruptcy Court for the Western District of Oklahoma added their own local rule addressing the use of AI.[144] However, the Oklahoma Bankruptcy Court went further than both the Fifth Circuit and Judge Starr.[145] As stated by the Court:

> [A]ny document filed with the Court that has been drafted utilizing a generative artificial intelligence program. . .must be accompanied by an attestation: (1) identifying the program used and the specific portions of text for which a generative artificial intelligence program was utilized; (2) certifying the document was checked for accuracy using print reporters, traditional legal databases, or other reliable means; and (3) certifying the use of such program has not resulted in the disclosure of any confidential information to any unauthorized party.

General Order 23-01. In Re: Pleadings using Generative Artificial Intelligence, OK R USBCTWD General Order 23-01. The Oklahoma Bankruptcy Court's rule applied the substance of Judge Starr's order, but followed Judge Vaden of the Court of International Trade in requiring that attorneys who used generative AI certify that confidential information was not disclosed.[146] Other judges have added different requirements when implementing their own AI orders.[147] Judge Baylson of the Eastern District of Pennsylvania has gone the furthest, requiring disclosure of *any*

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web.archive.org/web/20230531124314/https://www.txnd.uscourts.gov/judge/judge-brantley-starr.

141. *Id.*
142. *Id.*
143. *Id.*
144. General Order 23-01, OK R USBCTWD General Order 23-01 (2023).
145. *Id.*
146. Hulle *supra* note 139.
147. *Id.* Magistrate Judge Fuentes of the Northern District of Illinois requires the disclosure of generative AI but has no certification requirement.

AI usage, not just generative AI.[148] Two former federal judges note that this instructs attorneys to explain any programs used, even nonlegal tools such as Grammarly.[149] They further warn against rules impeding the use of AI even when the AI work is reliable, and they suggest a rule that focuses on simply confirming the accuracy of generative AI work products.[150] Even as AI grows into a fixture of modern society and becomes a common tool available to attorneys, there must remain an emphasis on attorney competence and diligence in commencing their duties.[151]

Attempts to reel in artificial intelligence use in the legal profession have extended beyond the judicial branch. In February 2023, the American Bar Association (ABA) House of Delegates adopted a resolution confronting the transparency and traceability issues in AI.[152] Resolution 604 focused on three main guidelines: (1) Developers of AI should ensure their products are subject to human authority and control; (2) organizations should be accountable for any consequences resulting from AI use, such as injury or harm, unless they have taken reasonable steps to prevent it; and (3) developers should ensure their AI products protect intellectual property and document key decisions made. These transparency and traceability guidelines will prove imperative as AI continues to grow and it becomes increasingly difficult to know when you are engaging with AI.[153] Despite the issues arising from AI use and the apparent need for additional regulations, artificial intelligence will continue to be an integral part of the legal profession going forward.

III.   THE FUTURE OF AI IN THE LEGAL INDUSTRY

In light of the Fifth Circuit's proposed AI rule change, two more federal appellate courts have started forming committees to dissect AI's effect on the courts.[154] The Ninth Circuit, located in San Francisco, and

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148.   *Id.*

149.   Hon. Bernice Bouie Donald & Hon. James C. Francis IV, et al., *Generative AI and Courts: How Are They Getting Along?*, PLI CHRONICLE (Sept. 2023), https://www.jamsadr.com/files/uploads/documents/articles/francis-james-pli-generative-ai-1023.pdf.

150.   *Id.*

151.   *Id.*

152.   Amanda Robert, *ABA House Adopts 3 Guidelines to Improve Use of Artificial Intelligence*, ABA J. (Feb. 6, 2023, 11:22 AM), https://www.abajournal.com/web/article/aba-house-adopts-3-guidelines-to-improve-use-of-artificial-intelligence.

153.   *Id.*

154.   Nate Raymond & Sara Merken, *Two US Appeals Courts Form Committees to Examine AI Use*, REUTERS (Jan. 25, 2024 5:21 PM), https://www.reuters.com/legal/government/9th-circuit-forming-committee-examine-ai-use-court-2024-01-25/.

the Third Circuit, located in Philadelphia, have created these committees to evaluate regulations concerning the implementation of artificial intelligence technologies.[155] As of November 2023, only 14 of 196 federal courts have released official guidance on AI.[156] With various perspectives on AI regulations, these discussions are expected to persist. It is improbable that we will see any new proposed rule changes at the circuit court level before the Fifth Circuit addresses the comments regarding the Rule 32.3 compliance amendment submitted to the Court. The Fifth Circuit's response will have a major influence on the future of AI regulation across the justice system.

Even with the further development of AI for legal applications, attorneys will remain essential to the justice system. Future lawyers can distinguish themselves from AI through judgment, empathy, creativity, and adaptability.[157] The "human aspects" of lawyering will always be advantageous to clients who need predictive analysis on factors other than straight precedent or law.[158] Furthermore, the next generation of attorneys will be critically important, as they will be trained from the start of their careers on how to effectively use AI tools for their clients' needs.[159]

While attorneys will remain important, the profession will likely undergo some changes. The structure and composition of law firms will likely evolve; the large numbers of associates currently needed for legal research will no longer be necessary as AI continues to enhance its accuracy and efficiency, becoming a primary tool for legal research.[160] Firms' practice areas will also likely shrink as firms shift toward increased specialization, as online AI platforms such as DoNotPay and LegalZoom experience increased traffic due to their low costs and variety of general legal services.[161] The goal for firms to thrive and remain profitable will likely include changes to the billing system as the responsibilities of

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155.   *Id.*

156.   Hulle *supra* note 139.

157.   Anthony Davis, *The Future of Law Firms (and Lawyers) in the Age of Artificial Intelligence*, ABA (Oct. 2, 2020), https://www.americanbar.org/groups/professional_responsibility/ publications/professional_lawyer/27/1/the-future-law-firms-and-lawyers-the-age-artificial-intelligence/.

158.   *Id.* For example, the disclosure of personal information or determination of trends regarding the opposing party, opposing counsel, or judge are best performed by humans.

159.   *Id.*

160.   *Id.*

161.   *Id.* LegalZoom offers businesses and individuals a wide range of legal services related to forming corporations, filing reports, and obtaining licenses. Dennis O'Reilly, *LegalZoom Review and Prices*, U.S. NEWS (Jan. 10, 2024), https://www.usnews.com/360-reviews/business/ llc-services/legalzoom. *See* DONOTPAY, https://donotpay.com/ (last visited Oct. 24, 2024).

attorneys evolve within their roles.[162] Any adjustments to the billing system will take time and understanding but will be crucial for the future of private firms.

Future enhancements in artificial intelligence technology will broaden AI's capabilities in legal research, contract analysis, and case prediction.[163] The ability of AI to complete more standardized tasks will allow attorneys to focus on more specific client needs. Tools such as Harvey have shown the capacity to positively affect the profession while protecting confidentiality and private data. In the wake of serious misrepresentations to the courts from attorneys using AI products, the Fifth Circuit's proposed rule change has led to more in-depth conversations about the expanding use of artificial intelligence. The legal profession is constantly changing, and artificial intelligence is guaranteed to be a major part of the industry's future. Legal professionals must understand the benefits and limitations of artificial intelligence tools in their practice and continue to follow their ethical duties as licensed attorneys.

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162. *Id.*

163. Soham Nandi, *Navigating AI Integration in Law*, AZoAi (July 16, 2024), https://www.azoai.com/article/Navigating-AI-Integration-in-Law.aspx.