

LET'S CHAT ABOUT CHATGPT: ETHICAL CONSIDERATIONS IN THE USE OF GENERATIVE AI

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by Hon. John G. Browning

I. INTRODUCTION

It was a veritable “shot heard ‘round the world.” On May 27, 2023, the *New York Times* reported that a federal judge had issued an order to show cause why plaintiff’s counsel in an aviation personal injury case should not be sanctioned for a pleading they filed that was replete with citations to non-existent cases.¹ This was a stunning revelation with a seismic effect on the legal landscape. As a sanctions hearing was held, a chain of events began with other examples of lawyerly misadventures with generative artificial intelligence (AI) cropping up all over the country. Within days of the *New York Times*’ story, U.S. District Court Judge Brantley Starr of Dallas, Texas fired the first judicial salvo in response, issuing a standing order requiring attorneys practicing before his court to disclose any use of generative AI tools like ChatGPT and certify that any AI-generated work had been thoroughly vetted by an actual human being before filing.² That standing order triggered a wave of similar orders by judges throughout the United States. An array of other stakeholders proceeded to weigh in as well, from bar associations forming taskforces to study the issue of generative AI to ethics bodies that pledged to provide ethics guidance.

The reaction is hardly surprising in light of the explosive growth of generative AI in the legal profession even while analysts have alternated between viewing AI tools as either a revolutionary paradigm-shifting innovation or an existential threat. Within just five days after

¹ Benjamin Weiss, *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?smid=nytcore-ios-share&referringSource=articleShare>.

² MANDATORY CERTIFICATION REGARDING GENERATIVE ARTIFICIAL INTELLIGENCE, HON. BRANTLEY STARR, U.S. DIST. CT., NORTHERN DIST. TEX., <https://www.txnd.uscourts.gov/judge/judge-brantley-starr>.

being introduced in November 2022, ChatGPT acquired one million users; by January 2023, there were 100 million monthly active users, and as of January 2024, the tool's users numbered 180.5 million.³ In March 2023, a report by Goldman Sachs estimated that AI tools could automate 44% of the legal tasks in the United States.⁴ In an April Thomson Reuters survey of lawyers asking about potential risks and the opportunities of using generative AI tools like ChatGPT, an overwhelming 82% responded that they believed that such tools *can* be applied to legal work, while only 51% responded that it *should*.⁵ A survey of legal, risk, and compliance professionals conducted in September 2023 by Deloitte found that while 42% expected to increase their use of generative AI for legal work a nearly equal number—40%—responded that they were not sure of how to leverage this technology.⁶ Meanwhile, a national survey of judges conducted by the National Judicial College revealed that nearly 76% had not tried generative AI, while another 7% who had used the tool reported a negative experience with it, usually regarding “hallucinations.”⁷

The truth is that, even amidst the breathless reports about ChatGPT's seemingly endless range of achievements (from “ChatGPT passes the LSAT” to “ChatGPT passes law school

³ Fabio Duarte, *Number of ChatGPT Users*, EXPLODINGTOPICS.COM (Jan. 5, 2024), <https://explodingtopics.com/blog/chatgpt-users>.

⁴ Rhys Dipshan, *Generative AI Could Automate Almost Half of All Legal Tasks, Goldman Sachs Estimates*, LAW.COM (Mar. 29, 2023), <https://www.law.com/legaltechnews/2023/03/29/generative-ai-could-automate-almost-half-of-all-legal-tasks-goldman-sachs-estimates/?slreturn=20231129182208>.

⁵ CHATGPT AND GENERATIVE AI WITHIN LAW FIRMS, THOMSON REUTERS INST. (Apr. 2023), <https://www.thomsonreuters.com/en-us/posts/wp-content/uploads/sites/20/2023/04/2023-Chat-GPT-Generative-AI-in-Law-Firms.pdf>.

⁶ Cassandre Coyer, *Hallucinations are Legal's Main Concern With Generative AI, But Maybe Not For Long*, LAW.COM (Nov. 27, 2023), <https://www.law.com/legaltechnews/2023/11/27/hallucinations-are-legals-main-concern-with-generative-ai-but-maybe-not-for-long/>.

⁷ Ed Cohen, *Most Judges Haven't Tried ChatGPT, and They Aren't Impressed*, NAT'L JUDICIAL COLLEGE (July 21, 2023), <https://www.judges.org/news-and-info/most-judges-havent-tried-chatgpt-and-they-arent-impressed/#:~:text=Of%20the%2033%20judges%20who,it%20and%20do%20like%20it>.

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