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(Current as of Nov. 29, 2025)

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Filed 9/12/25

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SYLVIA NOLAND, Plaintiff and Appellant, v. LAND OF THE FREE, L.P., et al., Defendants and Respondents.	B331918 (Los Angeles County Super. Ct. No. BC716737)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen I. Goorvitch, Judge. Affirmed.

Mostafavi Law Group and Amir Mostafavi for Plaintiff and Appellant.

Yadegari & Associates and Michael Yadegari for Defendants and Respondents.

This appeal is, in most respects, unremarkable. Plaintiff filed a complaint alleging a variety of employment-related claims, and the trial court granted defendants' motion for summary judgment, finding no triable issues as to any of those claims. Plaintiff challenges the grant of summary judgment on several grounds, none of which raises any novel questions of law or requires us to apply settled law in a unique factual context. In short, this is in most respects a straightforward appeal that, under normal circumstances, would not warrant publication.

What sets this appeal apart—and the reason we have elected to publish this opinion—is that nearly all of the legal quotations in plaintiff's opening brief, and many of the quotations in plaintiff's reply brief, are fabricated. That is, the quotes plaintiff attributes to published cases do not appear in those cases or anywhere else. Further, many of the cases plaintiff cites do not discuss the topics for which they are cited, and a few of the cases do not exist at all. These fabricated legal authorities were created by generative artificial intelligence (AI) tools that plaintiff's counsel used to draft his appellate briefs. The AI tools created fake legal authority—sometimes referred to as AI "hallucinations"—that were undetected by plaintiff's counsel because he did not read the cases the AI tools cited.

Although the generation of fake legal authority by AI sources has been widely commented on by federal and out-of-state courts and reported by many media sources, no California court has addressed this issue. We therefore publish this opinion as a warning. Simply stated, no brief, pleading, motion, or any other paper filed in any court should contain *any* citations—whether provided by generative AI or any other source—that the attorney responsible for submitting the pleading has not

personally read and verified. Because plaintiff's counsel's conduct in this case violated a basic duty counsel owed to his client and the court, we impose a monetary sanction on counsel, direct him to serve a copy of this opinion on his client, and direct the clerk of the court to serve a copy of this opinion on the State Bar.

FACTUAL AND PROCEDURAL BACKGROUND

I. Complaint.

Sylvia Noland (Noland) filed the present action in August 2018, and filed the operative second amended complaint (complaint) in August 2019. The complaint alleges as follows:

Defendants Jose Luis Nazar and Land of the Free, L.P. (collectively, defendants) own an office building located at 640 S. San Vicente Boulevard (the San Vicente property) and an event space located at 2400 Laurel Canyon Boulevard in Los Angeles (the Laurel Canyon property). In January 2018, defendants hired plaintiff to work as their leasing agent and sales representative. In that capacity, plaintiff showed the properties to potential lessees, prepared deal memos, and collected deposits and signatures on leases and contracts.

Defendants agreed to pay plaintiff for administrative work, plus a 6 percent commission for each event she booked at the Laurel Canyon property and a 2 percent commission for each tenant she secured for the San Vicente property. Defendants further agreed to pay plaintiff a $3,500 monthly draw against her earnings and commissions. However, defendants never paid plaintiff $1,000 per month for her administrative work, and in 2018 defendants told plaintiff they would no longer pay her a monthly draw. Further, defendants failed to pay plaintiff a

$60,000 commission she was owed for securing a lease worth $3.5 million over a 10-year term. Defendants also failed to pay plaintiff minimum wage or overtime, to maintain proper time records, and to provide plaintiff itemized wage statements.

In about June 2018, plaintiff learned that defendants did not have the necessary permits to lease office space at the San Vicente property to medical providers. Plaintiff "refused to work under intolerable working conditions that required [her to] secure lease agreements in blatant violation of the law and act unethically towards clients," and she "was therefore left with no reasonable alternative but to resign and was constructively terminated."

Plaintiff's complaint asserted 25 causes of action, including violations of California's wage and hour laws (1st–5th and 14th–22nd causes of action), retaliation (6th cause of action), constructive and wrongful termination (7th and 23rd causes of action), breach of contract (8th cause of action), quantum meruit (11th cause of action), violation of Business and Professions Code section 17200 (12th cause of action), penalties under the Private Attorneys General Act (PAGA; Lab. Code, § 1298) (13th cause of action), misclassification of employee as independent contractor (24th cause of action), and intentional infliction of emotional distress (25th cause of action).[1]

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[1] The trial court sustained demurrers to the ninth, tenth, and eighteenth causes of action, and thus we do not discuss them.

II. Defendants' first motion for summary judgment.

Defendants filed a motion for summary judgment in September 2022, noticing a hearing for December 1, 2022. Plaintiff moved to strike the motion as untimely. The trial court (Hon. David Sotelo) denied the summary judgment motion on the ground that it was not filed sufficiently in advance of the hearing date.

III. Defendants' request to continue trial and second motion for summary judgment.

A. Request to continue trial.

In January 2023, defendants filed an ex parte application to continue the trial from January to May 2023. Defendants' counsel stated that he had recently been in an automobile accident that limited his mobility and required multiple doctors' visits. Accordingly, "It would be very difficult for Defendant[s'] counsel to appear in trial at this time while he is in recovery."

Plaintiff responded that she was amenable to continuing the trial as long as the statutory five-year deadline for bringing the case to trial was tolled. At a January 2023 hearing, the parties stipulated to extending the five-year period through the end of December 2023, and the trial court continued the trial to May 2023. That date was later vacated, and trial was set for June 2023.

B. Second motion for summary judgment.

Defendants refiled their motion for summary judgment in January 2023. The motion was essentially identical to that filed in September 2022, urging that there were no triable issues of material fact as to any of plaintiff's causes of action.

Plaintiff responded by filing a motion for sanctions. Plaintiff asserted that sanctions were appropriate because (1) defendants had sought a trial continuance for the purpose of refiling their summary judgment motion, (2) defendants' second motion for summary judgment did not assert new or different facts or legal issues, and it therefore violated Code of Civil Procedure[2] section 437, subdivision (f)(2), and (3) the date on which the motion for summary judgment was set to be heard was fewer than 30 days prior to the date set for trial.

On May 25, 2023, the trial court denied the motion for sanctions and continued the hearing to allow plaintiff to file a substantive opposition to the summary judgment motion. The court's order explained as follows:

"This case originally was assigned to [Judge] David Sotelo . . . . Defendants previously filed a motion for summary judgment on September 29, 2022, and noticed the hearing for December 1, 2022, in advance of a trial date of January 17, 2023. Judge Sotelo denied the motion for lack of statutory notice without addressing the merits. Following Judge Sotelo's retirement, the case was reassigned . . . .

"Now, Defendants again move for summary judgment or, in the alternative, summary adjudication. Plaintiff did not file an opposition, but instead objected under . . . section 437c(f)(2), arguing that this is a successive motion for summary judgment. . . . The Court overrules the objection for three independent reasons.

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[2] All subsequent undesignated statutory references are to the Code of Civil Procedure.

"First, the Court interprets section 437c(f)(2) as prohibiting successive motions for summary judgment only when there has been a prior ruling on the merits. As discussed, Judge Sotelo denied the motion on procedural grounds without resolving the merits. Therefore, section 437c(f)(2) does not prohibit Defendants from filing a second motion for summary judgment.

"Second, . . . [a] trial court may not refuse to hear a motion for summary judgment filed and served sufficiently in advance of trial. [Citation.] Defendants had a right to a decision on the merits, given that they filed their motion 110 days before trial.

"Finally, in the alternative, the Court exercises its discretion and elects to consider Defendants' motion for summary judgment on the merits. Notwithstanding section 437c(f)(2), the Court has inherent authority to consider a second motion for summary judgment, provided there is good cause to do so. [Citation.] The Court does so for the reasons stated. Moreover, the issues raised in Defendants' motion should be decided in advance of trial. It would not promote the interests of judicial economy to select the jury and permit Plaintiff to conduct her case-in-chief before ruling on these issues on a motion for non-suit."

Plaintiff thereafter filed a substantive opposition to defendants' motion for summary judgment, urging that there were triable issues of fact as to each cause of action. The court held a hearing on the motion and, after taking the motion under submission, granted summary judgment for defendants. Among other things, the court found the evidence was undisputed that (1) plaintiff was an independent contractor, not an employee, and thus the wage and hour laws did not apply to her, (2) defendants did not owe plaintiff a commission because the tenant plaintiff

said she secured ultimately did not execute a lease with defendants, (3) plaintiff had not demonstrated that she was subject to any adverse employment actions that could form the basis for a retaliation action, and (4) plaintiff did not demonstrate triable issues as to her intentional infliction of emotional distress claim.

On July 25, 2023, plaintiff filed a notice of appeal from the order granting summary judgment.[3]

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[3] An order granting summary judgment is not an appealable order. (E.g, *Champlin/GEI Wind Holdings, LLC v. Avery* (2023) 92 Cal.App.5th 218, 223; *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 761, fn. 7.) Thus, in October 2023, this court directed plaintiff to provide the court with an appealable judgment or to explain why the appeal should not be dismissed. Plaintiff responded in a letter brief that no judgment had been entered, but the appeal should not be dismissed because the order granting summary judgment was a final order that resolved all pending issues between the parties. This court deferred the appealability question to the panel that would decide the appeal on the merits.

Although more than 18 months have passed since this court advised plaintiff of the need to obtain a judgment, plaintiff's counsel has not obtained one. Accordingly, we would be well within our discretion to dismiss the appeal. (See *Blauser v. Dubin* (2024) 106 Cal.App.5th 918, 920–923 [dismissing appeal from minute order granting motion for nonsuit].) Nonetheless, in the interests of justice and to avoid delay, we construe the order granting summary judgment as incorporating an appealable judgment, and the notice of appeal as appealing from such judgment. (See *Blauser*, at p. 922 & fn. 4; *Levy v. Skywalker Sound*, *supra*, 108 Cal.App.4th at p. 761, fn. 7.)

DISCUSSION

I. Plaintiff's counsel's reliance on fabricated legal authority.

We begin by noting that nearly all of the quotations in plaintiff's opening brief, and many of the quotations in plaintiff's reply brief, have been fabricated. That is, as noted above, although most of the cases to which the quotes are attributed exist, the quotes do not. Further, many of the cases plaintiff cites do not support the propositions for which they are cited or discuss other matters entirely, and a few of the cases do not exist at all. To give just a few examples:

Plaintiff asserts: "In *Schimmel v. Levin* (2011) 195 Cal.App.4th 81, the court discussed the legislative purpose behind Section 437c(f)(2), highlighting that it was enacted to prevent abuse of the summary judgment procedure by disallowing multiple motions on the same issues." In fact, *Schimmel* does not contain a single reference to either summary judgment or section 437c. Appellant's opening brief also purports to quote *Schimmel* as follows: "In *Schimmel v. Levin* (2011) 195 Cal.App.4th 81, 86–87, the court held: 'Section 437c(f)(2) embodies a legislative judgment that a party should not be allowed to bring multiple motions for summary judgment based on the same issues without demonstrating newly discovered facts or circumstances or a change in the law. This policy applies even when the prior motion was denied on procedural grounds.' " The quoted language does not appear in *Schimmel*—or in any other case of which we are aware.

Plaintiff also asserts: "In *Regency Health Services, Inc. v. Superior Court* (1998) 64 Cal.App.4th 1496, 1504, the court emphasized: 'A continuance should not be granted when it is

sought to facilitate procedural maneuvers rather than to promote justice.' " *Regency* does not address the granting of a continuance, and the quoted language does not appear anywhere in the opinion.

Plaintiff further asserts: "The court in *Peake v. Underwood*, 227 Cal.App.4th 428, 448 (2014), emphasized that filing a second dispositive motion without new facts or law is frivolous and subject to sanctions." *Peake* does not address the filing of a second dispositive motion, and the only sanctions at issue in that case were for filing a frivolous pleading. (*Id.* at pp. 432–450.)

Plaintiff additionally asserts: "As in *Goldstine v. Liberty Mut. Ins. Co.*, 2020 WL 6216738 (W.D. Wash. 2020), where sanctions were imposed for similar baseless claims of personal hardship to delay proceedings, Mr. Yadegari's actions warranted sanctions under California Code of Civil Procedure § 128.5 for making false statements to obtain an improper advantage." *Goldstine* appears to be a fabricated case.

And, plaintiff asserts: "The California Court of Appeal in *Heckert v. MacDonald*, 208 Cal.App.3d 832, 837 (1989), emphasized that sanctions should be imposed where a party uses procedural rules to gain an unfair advantage by engaging in 'frivolous litigation tactics.' " The words "frivolous," "unfair," and "tactics" do not appear in *Heckert*, which concerns the appellants' claim that the trial court erred by refusing to order their real estate broker to pay their attorney fees as damages.

In total, appellant's opening brief contains 23 case quotations, 21 of which are fabrications. Appellant's reply brief contains many more fabricated quotations. And, both briefs are

peppered with inaccurate citations that do not support the propositions for which they are cited.

The extensive reliance on nonexistent legal authority would justify striking appellant's opening brief or dismissing the appeal. (See, e.g., *In re Marriage of Deal* (2022) 80 Cal.App.5th 71, 77–81 [dismissing frivolous appeal]; *Huang v. Hanks* (2018) 23 Cal.App.5th 179, 182 [" 'appellate courts possess the . . . inherent power to summarily dismiss any action or appeal which . . . is based upon . . . frivolous grounds' "].) Nonetheless, because nothing indicates that plaintiff was aware that her counsel had fabricated legal authority, and defendants addressed plaintiff's contentions on the merits, we will do the same. (See *People v. Wende* (1979) 25 Cal.3d 436, 443 [affirming on the merits rather than dismissing appeal as frivolous: "Once the record has been reviewed thoroughly, little appears to be gained by dismissing the appeal rather than deciding it on its merits"].)[4]

II. Plaintiff's substantive arguments lack merit.

A. The trial court did not abuse its discretion by considering defendants' second motion for summary judgment on the merits.

Section 437c, subdivision (f)(2), provides: "A party shall not move for summary judgment based on issues asserted in a prior motion for summary adjudication and denied by the court unless that party establishes, to the satisfaction of the court, newly discovered facts or circumstances or a change of law supporting the issues reasserted in the summary judgment motion."

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[4] We will, however, impose sanctions on plaintiff's counsel for filing a frivolous brief, as we discuss in part III of the Discussion.

Plaintiff contends that because defendants' second motion for summary judgment did not assert newly discovered facts or a change of law, the trial court lacked discretion under section 437c, subdivision (f)(2) to consider it. The trial court's authority to consider defendants' renewed motion for summary judgment is a question of law, which we review de novo. (*Marshall v. County of San Diego* (2015) 238 Cal.App.4th 1095, 1105 (*Marshall*); *People v. Lujan* (2012) 211 Cal.App.4th 1499, 1507 [whether a trial court has inherent authority to take an action is reviewed de novo].)

Plaintiff's contention is directly contrary to our Supreme Court's decision in *Le Francois v. Goel* (2005) 35 Cal.4th 1094 (*Le Francois*). There, the high court held that while section 437c, subdivision (f)(2) "prohibit[s] *a party* from making renewed motions not based on new facts or law," it does not restrict a trial court's inherent authority in any manner. (*Le Francois*, at pp. 1096–1097.) Indeed, the court said, an interpretation of section 437c, subdivision (f)(2) that limited the trial court's authority to reconsider its own rulings would raise "difficult constitutional questions"—namely, whether the statute " 'emasculate[s] the judiciary's core power to decide controversies between parties.' " (*Le Francois*, at pp. 1104–1105.)

The *Le Francois* court explained that while a trial court is not required to rule on a second motion for summary judgment, courts "cannot prevent a party from communicating the view to a court that it should reconsider a prior ruling." (*Le Francois*, *supra*, 35 Cal.4th at p. 1108.) Further, "it should not matter whether the 'judge has an unprovoked flash of understanding in the middle of the night' [citation] or acts in response to a party's suggestion. If a court believes one of its prior interim orders was

erroneous, it should be able to correct that error no matter how it came to acquire that belief." (*Ibid.*) Thus, the court said, section 437c does "not limit a *court's* ability to reconsider its previous interim orders on its own motion, as long as it gives the parties notice that it may do so and a reasonable opportunity to litigate the question."[5] (*Le Francois*, at p. 1097; see also *id.* at pp. 1108–1109 ["To be fair to the parties, if the court is seriously concerned that one of its prior interim rulings might have been erroneous, and thus that it might want to reconsider that ruling on its own motion . . . it should inform the parties of this concern, solicit briefing, and hold a hearing"]; *Marshall*, *supra*, 238 Cal.App.4th at pp. 1104–1107 [trial court had inherent authority to entertain successive motions for summary judgment or summary adjudication]; *Minick v. City of Petaluma* (2016) 3 Cal.App.5th 15, 34 ["Trial courts always have discretion to revisit interim orders in service of the paramount goal of fair and accurate decisionmaking"].)

Le Francois is dispositive of plaintiff's contention that the trial court lacked discretion to consider the renewed motion for summary judgment. While the trial court was not *required* to rule on defendants' motion, it had discretion to exercise its inherent power to reconsider the prior order denying summary judgment and, having done so, to grant the motion. Plaintiff's contention to the contrary is wholly without merit.

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[5] Because the trial court in *Le Francois* had not warned the parties it might change its previous ruling or allowed the parties to be heard on the issue, the Supreme Court remanded the matter "for the court and parties to follow proper procedure." (*Le Francois*, *supra*, 35 Cal.4th at p. 1109 & fn. 6.)

B. The trial court did not abuse its discretion by denying plaintiff's motion for sanctions.

Below, plaintiff sought sanctions under sections 128.5 and 128.7 on the grounds that (1) defendants were prohibited under section 437c, subdivision (f)(2) from filing a second motion for summary judgment on the same grounds, and (2) defendants' counsel's claim that he had been in an automobile accident "was false, unsubstantiated, and was made in bad faith only to obtain [a] continuance to the trial date, so Defendants could file their second MSJ." In support, plaintiff asserted: "If [defendants' attorney] Mr. Yadegari's health condition resulting from the car accident indeed impaired his ability to prepare and appear for trial, it should also have prevented him [from preparing] for the [s]econd MSJ. . . . What is at issue here is whether Mr. Yadegari alleged his bodily injuries to continue the trial so he could re-use the [f]irst MSJ? The answer must be affirmative . . . ." The trial court rejected plaintiff's contention that sanctions were warranted, finding that there was good cause for defendants to renew their summary judgment motion, and the record did "not support Plaintiff's counsel's argument that Defendants' counsel misrepresented having been in an accident in order to obtain a continuance under false pretenses."

Plaintiff contends that the trial court erred by denying the motion for sanctions. We review a sanctions order for an abuse of discretion. (*McCluskey v. Henry* (2020) 56 Cal.App.5th 1197, 1205.) Under that standard, we "presume the trial court's order is correct and do not substitute our judgment for that of the trial court." (*Ibid.*) Further, we will uphold all orders based on express or implied findings supported by substantial evidence.

(*Hanna v. Mercedes-Benz USA, LLC* (2019) 36 Cal.App.5th 493, 513; *Frei v. Davey* (2004) 124 Cal.App.4th 1506, 1512.)

The trial court did not abuse its discretion by denying plaintiff's motion for sanctions. In support of defendants' application to continue trial, attorney Michael Yadegari declared under penalty of perjury that he "was recently in an accident where I was run over by a Sports Utility Vehicle ('SUV') while I was riding a scooter. This event has limited my mobility and I have to go to multiple doctors for my injury. It would be very difficult for me . . . to appear in trial at this time while I am in recovery." Plaintiff's sanctions motion provided no evidence that defendants' counsel had not been in an accident, but merely suggested the trial court should *infer* that was the case because counsel had been able to file a second motion for summary judgment. But the filing of the second motion for summary judgment did not require the inference plaintiff suggests. As plaintiff herself admits, the second summary judgment motion was "virtually identical" to the first, and thus the trial court was not required to infer from its filing that counsel's injuries were fabricated. Moreover, attending a trial in person requires a physical stamina that preparing a motion does not. And, in any event, the trial court was well within its discretion in crediting defendants' counsel's sworn testimony. (See, e.g., *Santa Clara County Correctional Peace Officers' Assn., Inc. v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1027 [when reviewing a " ' "judgment based on affidavits or declarations," ' " a reviewing court " ' "defer[s] to [the trial court's] determination of credibility of the witnesses" ' "].) The trial court thus did not err by denying the motion for sanctions.

C. Plaintiff has not demonstrated error with regard to her PAGA and employment claims.

Plaintiff contends the trial court erred by "fail[ing] to recognize disputed material facts in plaintiff's PAGA and employment claims." However, plaintiff does not identify any evidence in the record to support her claim. The contention, thus, is forfeited. (E.g., *Coziahr v. Otay Water Dist.* (2024) 103 Cal.App.5th 785, 799 (*Coziahr*) ["Points must be supported by reasoned argument, authority, and record citations, or may be deemed forfeited"]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785 ["When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived"].)

D. The trial court did not err by denying plaintiff's request to reopen discovery.

At the May 25, 2023 hearing on defendants' motion for summary judgment, plaintiff's counsel asked the court to continue the hearing date and to reopen discovery. The court granted the motion to continue and allowed plaintiff to file an opposition on the merits, but it denied the request to reopen discovery. The court explained: "[T]he Court denies the request to reopen discovery for multiple independent reasons. Plaintiff's counsel represented at the case management conference that discovery should remain closed. [Citation.] Plaintiff's counsel's request was not made in writing with proper notice to Defendants' counsel. Plaintiff's counsel does not articulate what 'facts essential to justify opposition may exist but cannot, for reasons stated, be presented,' as required by . . . section 437c(h). This case was filed four years and nine months ago, and

Plaintiff's counsel has had ample opportunity to conduct discovery. The record reflects no good cause for Plaintiff's counsel not having conducted the depositions of those who provided declarations in support of the motion. Indeed, their identities and significance to the case would have been clear at the outset, even assuming they were not identified in discovery. Finally, the schedule does not permit time to reopen discovery, given the age of the case, the impending five-year deadline, and the difficulty of setting trials later this year given congestion of the Court's calendar and the holidays."

Plaintiff contends the trial court erred by denying her request to reopen discovery in order to oppose defendants' motion for summary judgment. Plaintiff cites no legal authority in support of this contention, and thus she has forfeited it. (*Coziahr*, *supra*, 103 Cal.App.5th at p. 799.)

E. The trial court did not abuse its discretion by "fail[ing] to review plaintiff's opposition papers before issuing its tentative ruling."

Plaintiff asserts that the order granting summary judgment must be reversed because the trial court "failed to review" her opposition to the summary judgment motion. In support, plaintiff points to the trial court's statements at the May 25, 2023 hearing that plaintiff "did not oppose the motion on the merits," and at the June 26, 2023 hearing that it was "a bit confused why [an opposition] was not filed in the first place." Plaintiff suggests that these statements "strongly impl[y] the court overlooked or ignored the opposition papers filed by the plaintiff, a clear procedural error."

Plaintiff's contention is entirely without merit. " 'It is presumed that official duty has been regularly performed'

(Evid. Code, § 664)," and in the absence of contrary evidence, we must assume that the trial court followed the law. (*People v. Campo* (1987) 193 Cal.App.3d 1423, 1432.) No such evidence appears here. To the contrary, plaintiff's counsel conceded in the trial court (and it is apparent from the record) that a substantive opposition to defendants' motion for summary judgment had not been filed before the May 25, 2023 hearing. Indeed, it was *because* no opposition had been filed that the summary judgment hearing was continued a month, to June 26, 2023. And, at the June 26, 2023 hearing, the court stated that it allowed plaintiff to file an opposition on the merits, but "[t]he opposition was not persuasive to me." The trial court could not have made that statement had it not reviewed plaintiff's opposition. We perceive no abuse of discretion.

For all the foregoing reasons, the trial court did not err by granting summary judgment for defendants. We therefore will affirm the judgment.

III. Sanctions for pursuit of a frivolous appeal.

Prior to oral argument in this case, on our own motion we issued an order to show cause (OSC) why this court should not sanction plaintiff's counsel, Amir Mostafavi, for filing appellate briefs replete with fabricated quotes and citations. The OSC noted that nearly all of the quotations in appellant's opening brief, as well as many in the reply brief, were fabricated, and it warned that sanctions might include both an award of attorney fees and costs to defendants and an award of sanctions payable to the clerk of this court.

Attorney Mostafavi filed a written response. He acknowledged that he relied on AI "to support citation of legal issues" and that the fabricated quotes were AI-generated. He

further asserted that he had not been aware that generative AI frequently fabricates or hallucinates legal sources and, thus, he did not "manually verify [the quotations] against more reliable sources." Mostafavi accepted responsibility for the fabrications and said he had since taken measures to educate himself so that he does not repeat such errors in the future. He asserted, however, that "[t]he majority of citations are accurate and support the propositions that were being advanced"; the appeal is not frivolous; and in spite of fabricated quotations, the brief "stands on meritorious arguments that are fully supported by the record." Mostafavi therefore urges that "[s]hould the Court determine that some corrective action is warranted," the appropriate remedy "is correction of the briefs rather than monetary sanctions" because counsel's "citation irregularities," although "regrettable," "do not rise to the level requiring punitive measures given the isolated nature of the problems relative to the briefs' overall representation of the reversible errors made by the trial court based on the cited record and not necessarily in complete reliance on the cited authorities."

At oral argument, attorney Mostafavi explained that he wrote initial drafts of the briefs, "enhanced" the briefs with ChatGPT, and then ran the "enhanced" briefs through other AI platforms to check for errors. Counsel admitted that he did not read the "enhanced" briefs before he filed them.

For the reasons that follow, we decline to permit the filing of revised briefs and conclude that an award of sanctions against attorney Mostafavi is appropriate.

A. Legal principles.

The Code of Civil Procedure permits an appellate court to impose sanctions for filing a frivolous appeal. (§ 907 ["When it

appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just"]; § 128.7 [attorney may be sanctioned for submitting pleading for which the attorney does not have a belief "formed after an inquiry reasonable under the circumstances" that the "legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law"].) The Rules of Court similarly permit the court to sanction a party or attorney for filing a frivolous appeal or motion, as well as for including in the record matters not reasonably material to the appeal or "[c]ommitting any other unreasonable violation of these rules." (Cal. Rules of Court,[6] rule 8.276(a)(4); see also *Huschke v. Slater* (2008) 168 Cal.App.4th 1153, 1155–1156.)

An appeal is frivolous if it is prosecuted for an improper motive or indisputably has no merit. "To determine whether an appeal is frivolous, we apply both a subjective standard, examining the motives of appellant and its counsel, and an objective standard, analyzing the merits of the appeal. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649–650.) A finding of frivolousness may be based on either standard by itself, but the two tests are ordinarily used together, with one sometimes providing evidence relevant to the other." (*Malek Media Group, LLC v. AXQG Corp.* (2020) 58 Cal.App.5th 817, 834 (*Malek*).) An appeal may be objectively frivolous if "appellant's arguments rest on negligible legal foundation." (*Id.* at pp. 834–835, quoting *Kurokawa v. Blum* (1988) 199 Cal.App.3d 976, 995–996); see also

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[6] All subsequent rule references are to the Rules of Court.

Estate of Kempton (2023) 91 Cal.App.5th 189, 206 [quoting *Malek*].)

Even if an appeal is not frivolous, this court has authority under rule 8.276 to sanction a party who unreasonably violates the Rules of Court. (See, e.g., *Bryan v. Bank of America* (2001) 86 Cal.App.4th 185, 194 [" '[e]ven if an appeal is neither frivolous nor filed solely for delay, we have independent authority under rule 26(a) of the California Rules of Court [now, rule 8.276] to sanction a party who "has been guilty of any . . . unreasonable infraction of the rules . . . as the circumstances of the case and the discouragement of like conduct in the future may require" ' "]; *Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 96 [same].) The Rules of Court require parties to support each point in a brief "if possible, by citation of authority." (Rule 8.204(a)(1)(B).) Thus, courts have, in appropriate cases, sanctioned attorneys for including improper material in appellate briefs or failing to support assertions of law with legal authority. (See, e.g., *Evans v. Centerstone Development Co.* (2005) 134 Cal.App.4th 151, 166 [imposing sanctions for filing appellate briefs that "are cornucopias of" violations of rules of appellate procedure]; *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 884–885 [sanctioning attorney for citing unpublished opinion and asserting facts not supported by the record]; *Schulz v. Wulfing* (1967) 251 Cal.App.2d 776, 778–779 [sanctioning attorney for filing appellate brief containing "but two references to" the appellate record].) Such sanctions are appropriate to enforce court rules and "to discourage similar conduct in the future." (*Evans*, at p. 168.)

B. Counsel's reliance on fabricated legal authority renders this appeal frivolous and violative of the California Rules of Court.

Appellant's counsel has acknowledged that his briefs are replete with fabricated legal authority, which he admits resulted from his reliance on generative AI sources such as ChatGPT, Claude, Gemini, and Grok. Counsel says that he was not previously aware of the problem of AI "hallucinations," but he has educated himself about the issue since receiving the OSC.

In the last two years, many courts have confronted briefs populated with fraudulent legal citations resulting from attorneys' reliance on generative AI. One court noted: "The issue of AI programs populating and citing to fake or nonexistent legal authority, what has become known as AI 'hallucinations,' is an issue for courts that is becoming far too common." (*Powhatan County School Board v. Skinger* (E.D. Va., June 2, 2025, No. 3:24cv874) 2025 WL 1559593, at *9 (*Powhatan*).) Another court referenced a case citation that "has all the markings of a hallucinated case created by generative artificial intelligence (AI) tools such as ChatGPT and Google Bard that have been widely discussed by courts grappling with fictitious legal citations and reported by national news outlets." (*United States v. Hayes* (E.D. Cal. 2025) 763 F.Supp.3d 1054, 1065 (*Hayes*).) And yet another noted a plaintiff's "false citations" that "appear to be hallmarks of an artificial intelligence ('AI') tool," observing that "[i]t is now well known that AI tools 'hallucinate' fake cases." (*Schoene v. Oregon Dept. of Human Services* (D. Or., July 18, 2025, No. 3:23-cv-742-SI) 2025 WL 2021654 (*Schoene*), at *7; see also *Hall v. Academy Charter School* (E.D.N.Y. Aug. 7, 2025, No. 2:24-cv-08630-JMW) 2025 WL 2256653, at *4 ["The appearance of

hallucinated citations in briefs generated from AI is no longer in its nascent stage. Regrettably, the number and regularity with which courts have been faced with hallucinations in court filings continues to rise"].)

One recent article suggests that the problem of AI hallucinations is getting worse, not better, noting that OpenAI's newest models hallucinated "30–50% of the time, according to company tests." (Murray, *Why AI Hallucinations Are Worse Than Ever*, Forbes.com (May 6, 2025) <https://www.forbes.com/sites/conormurray/2025/05/06/why-ai-halluncinations-are-worse-than-ever/> [as of Sept. 12, 2025], archived at <https://perma.cc/Q8NU-AEZ9>.) The article explained that many AI models "are designed to maximize the chance of giving an answer, meaning the bot will be more likely to give an incorrect response than admit it doesn't know something." (*Ibid.*) A district court recently noted that this means AI hallucinations are "more likely to occur when there are little to no existing authorities available that clearly satisfy the user's request" (*In re Richburg* (Bankr. D.S.C., Aug. 27, 2025, No. AP 25-80037-EG) 2025 WL 2470473, at *5, fn. 11)—such as, for example, when a lawyer asks a generative AI tool to supply a citation for an unsupported principle of law. And, because AI responses generally are "grammatically correct and . . . presented as fact" (Murray, *supra*), fabrications are not readily apparent. (See *Malone-Bey v. Lauderdale County School Board* (S.D. Miss., July 25, 2025, No. 3:25-cv-380-KHJ-MTP) 2025 WL 2098352, at *4 ["[H]allucinated cases look like real cases. They are identified by a case name, a citation to a reporter, the name of a district or appellate court, and the year of the decision. [Citation.] But, they are not real cases. These hallucinated cases are instead

inaccurate depictions of information from AI models that suffer from incomplete, biased, or otherwise flawed training data"].)

Many courts confronted with AI-generated authorities have concluded that filing briefs containing fabricated legal authority is sanctionable. (See, e.g., *Johnson v. Dunn* (N.D. Ala., July 23, 2025, No. 2:21-cv-1701-AMM) 2025 WL 2086116, at *1 [publicly reprimanding counsel for including fabricated citations in briefs, disqualifying counsel from further participation in the case, and referring counsel to the state bar]; *Powhatan*, *supra*, 2025 WL 1559593, at *10 ["The pervasive misrepresentations of the law in [defendant's] filings cannot be tolerated. . . . It causes an enormous waste of judicial resources to try to find cited cases that do not exist"]; *Garner v. Kadince, Inc.* (Utah Ct. App. 2025) 571 P.3d 812, 816 [sanctioning counsel for filing appellate briefs containing fabricated legal authority]; *Versant Funding LLC v. Teras Breakbulk Ocean Navigation Enterprises, LLC* (S.D. Fla., May 20, 2025, No. 17-cv-81140) 2025 WL 1440351, at *3 (*Versant*) [noting court's "inherent authority to sanction the misuse of AI when it affects the Court's docket, case disposition, and ruling"]; *Lacey v. State Farm General Insurance Co.* (C.D. Cal., May 5, 2025, No. CV 24-5205 FMO (MAAx)) 2025 WL 1363069, at *1, fn. omitted [sanctioning counsel for "submitt[ing] briefs to the Special Master that contained bogus AI-generated research"]; *Benjamin v. Costco Wholesale Corporation* (E.D.N.Y. 2025) 779 F.Supp.3d 341, 347 ["Across the country, courts have issued a panoply of sanctions against attorneys who submitted fake cases"]; *Kruse v. Karlen* (Mo. Ct. App. 2024) 692 S.W.3d 43, 52 ["Filing an appellate brief with bogus citations in this Court for any reason cannot be countenanced and represents a flagrant violation of the duties of candor Appellant owes to this Court"];

Lee v. R&R Home Care, Inc. (E.D. La., Aug. 28, 2025, No. CV 24-836) 2025 WL 2481375, at *4 [sanctioning counsel for filing a brief containing a fabricated quotation; "The submission of any false authority undermines the Court's confidence in counsel's work and forces the Court to expend significant resources addressing the misconduct"]; *In re Richburg*, *supra*, 2025 WL 2470473, at *1 [sanctioning counsel for filing a pleading citing "fake caselaw 'hallucinated' by AI"].)

We agree with the cases cited above that relying on fabricated legal authority is sanctionable. As a district judge recently held when presented with nonexistent precedent generated by ChatGPT: "A fake opinion is not 'existing law' and citation to a fake opinion does not provide a non-frivolous ground for extending, modifying, or reversing existing law, or for establishing new law. An attempt to persuade a court or oppose an adversary by relying on fake opinions is an abuse of the adversary system." (*Mata v. Avianca, Inc.* (S.D.N.Y. 2023) 678 F.Supp.3d 443, 461, fn. omitted; see also *Park v. Kim* (2d Cir. 2024) 91 F.4th 610, 615 [quoting *Mata*].)

To state the obvious, it is a fundamental duty of attorneys to *read* the legal authorities they cite in appellate briefs or any other court filings to determine that the authorities stand for the propositions for which they are cited. Plainly, counsel did not read the cases he cited before filing his appellate briefs: Had he read them, he would have discovered, as we did, that the cases did not contain the language he purported to quote, did not support the propositions for which they were cited, or did not exist. (See *Benjamin v. Costco Wholesale Corporation*, *supra*, 779 F.Supp.3d at p. 343 ["an attorney who submits fake cases clearly has not *read* those nonexistent cases, which is a violation

of [the federal equivalent of § 128.7]"]; *Willis v. U.S. Bank National Association as Trustee, Igloo Series Trust* (N.D. Tex., May 15, 2025, No. 3:25-cv-516-BN) 2025 WL 1408897, at *2 [same].) Counsel thus fundamentally abdicated his responsibility to the court and to his client. (See *Kleveland v. Siegel & Wolensky, LLP* (2013) 215 Cal.App.4th 534, 559 [" 'It is critical to both the bench and the bar that we be able to rely on the honesty of counsel. The term "officer of the court," with all the assumptions of honor and integrity that append to it, must not be allowed to lose its significance' "].)

Counsel acknowledges that his reliance on generative AI to prepare appellate briefs was "inexcusable," but he urges that he should not be sanctioned because he was not aware that AI can fabricate legal authority and did not intend to deceive the court. Although we take counsel at his word—and although there is nothing inherently wrong with an attorney appropriately using AI in a law practice—before filing any court document, an attorney must "carefully check every case citation, fact, and argument to make sure that they are correct and proper. Attorneys cannot delegate that role to AI, computers, robots, or any other form of technology. Just as a competent attorney would very carefully check the veracity and accuracy of all case citations in any pleading, motion, response, reply, or other paper prepared by a law clerk, intern, or other attorney before it is filed, the same holds true when attorneys utilize AI or any other form of technology." (See *Versant*, *supra*, 2025 WL 1440351, at *4.)

We note, moreover, that the problem of AI hallucinations has been discussed extensively in cases and the popular press for several years. (See, e.g., Mulvaney, *Judge Sanctions Lawyers*

Who Filed Fake ChatGPT Legal Research, Wall. St. J. (June 22, 2023) <https://www.tinyurl.com/mup8cn6d> [as of Sept. 12, 2025], archived at <https://perma.cc/H3HG-VAQ7>; Weiser, *Here's What Happens When Your Lawyer Uses ChatGPT*, N.Y. Times (May 27, 2023) <https://tinyurl.com/yxhza24w> [as of Sept. 12, 2025], archived at <https://perma.cc/H355-YHGC>; *Schoene*, *supra*, 2025 WL 1755839, at *7 ["It is now well known that AI tools 'hallucinate' fake cases"]; *Powhatan*, *supra*, 2025 WL 1559593, at *9; *Hayes*, *supra*, 763 F.Supp.3d at p. 1065.) Thus, even a superficial review of the literature would have alerted counsel to this issue. Further, the State Bar of California released "Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law" nearly two years ago, in November 2023. Citing specific California Rules of Professional Conduct, that guidance notes that generative AI outputs may "include information that is false, inaccurate, or biased," and thus a lawyer who uses these outputs as a "starting point" must "critically review, validate, and correct both the input and the output of generative AI" to, among other things, "detect[] and eliminat[e] . . . false AI-generated results." (<https://tinyurl.com/4p59uyup> [as of Sept. 12, 2025], archived at <https://perma.cc/KG9Q-7YQD>.)[7]

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[7] Additionally, the notes to Rule 1.1 of the California Rules of Professional Conduct expressly provide that "[t]he duties set forth in this rule include the duty to keep abreast of the changes in the law and its practice, including the benefits and risks associated with relevant technology." (See Editors' Note 1, Cal. Rules Prof. Conduct, foll. rule 1.1.) We therefore do not agree that counsel's failure to educate himself about the limitations of

Counsel also asserts that sanctions are not appropriate because the brief's errors are "isolated" and "[t]he substantive legal authorities remain sound regardless of citation format irregularities." In other words, counsel suggests, his conduct is not sanctionable because *some* of his assertions are supported by accurate legal citations, and other assertions, although misattributed, find support in cases he did not cite. These contentions lack merit. Plainly, counsel's errors are not "isolated." As noted above, nearly *all* of the case quotations in appellant's opening brief and many more from appellant's reply brief are fabricated, and many of the cited cases do not stand for the propositions for which they are cited. These inaccuracies permeate plaintiff's opening and reply briefs. Moreover, "it is not this court's function to serve as [appellant's] backup appellate counsel." (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 546.) It is counsel's job—*not* this court's—to identify legal authority to support appellant's contentions. The existence of (uncited) cases in support of plaintiff's legal contentions does not excuse the fraudulent case cites.[8]

In short, we conclude that this appeal is frivolous because it "rest[s] on negligible legal foundation" (*Malek*, *supra*, 58 Cal.App.5th at pp. 834–835) and is peppered with fabricated legal citations. The appeal also unreasonably violates the Rules

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the legal tools he relied on makes the imposition of sanctions inappropriate.

[8] Nor is it correct that plaintiff's "substantive legal arguments [are] sound" notwithstanding the fabricated citations. To the contrary, as we have discussed, plaintiff's appellate contentions are wholly without merit.

of Court because it does not support each point with citations to real (as opposed to fabricated) legal authority. (See Rule 8.204(a)(1)(B).)

C. An award of sanctions is appropriate in this case.

Sanctions may be awarded to the respondent to compensate for the costs of responding to a frivolous appeal, or to the clerk of the court for conduct that unnecessarily burdens the court and the taxpayers. As one court has explained, " 'Respondent[s] . . . are not the only parties damaged when an appellant pursues a frivolous claim. Other appellate parties, many of whom wait years for a resolution of bona fide disputes, are prejudiced by the useless diversion of this court's attention. [Citation.] In the same vein, the appellate system and the taxpayers of this state are damaged by what amounts to a waste of this court's time and resources. [Citations.] Accordingly, an appropriate measure of sanctions should also compensate the government for its expense in processing, reviewing and deciding a frivolous appeal.' (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 17.)" (*Kleveland v. Siegel & Wolensky, LLP*, *supra*, 215 Cal.App.4th at p. 559; see also *Huschke v. Slater*, *supra*, 168 Cal.App.4th at p. 1161 [quoting *Finnie*]; accord *Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 189–190; *In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 519–520.)

Attorney Mostafavi's fabricated citations and erroneous statements of law have required this court to spend excessive time on this otherwise straightforward appeal to attempt to track down fabricated legal authority and then to research the issues presented without plaintiff's assistance. We therefore conclude that an award of sanctions payable to the court is appropriate.

In 2013, another appellate court noted that appellate sanctions for frivolous appeals recently had ranged from $6,000 to $12,500, "generally, but not exclusively, based on the estimated cost to the court of processing a frivolous appeal." (*Kleveland*, *supra*, 215 Cal.App.4th at p. 560, citing *Kim v. Westmoore Partners, Inc.* (2011) 201 Cal.App.4th 267, 294.) The costs of processing a frivolous appeal have undoubtedly increased in the intervening 12 years. Nonetheless, because counsel has represented that his conduct was unintentional, and because he has expressed remorse for his actions, we impose a conservative sanction of $10,000. Such sanction shall be payable to the clerk of this court within 30 days of the filing of the remittitur. (See *Workman v. Colichman* (2019) 33 Cal.App.5th 1039, 1064–1065 [imposing sanctions of $8,500]; *Kim*, at p. 294 [imposing sanction of $10,000]; *DeRose v. Heurlin* (2002) 100 Cal.App.4th 158, 182 [imposing sanction of $6,000].)[9] We also direct counsel to serve a copy of this opinion on his client, and direct the clerk of the court to serve a copy of this opinion on the State Bar.

We decline to order sanctions payable to opposing counsel. While we have no doubt that such sanctions would be appropriate in some cases, in the present case respondents did not alert the court to the fabricated citations and appear to have become aware of the issue only when the court issued its order to show cause. Further, although respondents have requested that appellant be ordered to pay "all [respondents'] attorney's fees and

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[9] This opinion constitutes a written statement of our reasons for imposing sanctions. (*Workman v. Colichman*, *supra*, 33 Cal.App.5th at p. 1065; *In re Marriage of Flaherty*, *supra*, 31 Cal.3d at p. 654.)

costs incurred in connection with this appeal," they have not submitted a declaration attesting to what those fees and costs are.

We conclude by noting that "hallucination" is a particularly apt word to describe the darker consequences of AI. AI hallucinates facts and law to an attorney, who takes them as real and repeats them to a court. This court detected (and rejected) these particular hallucinations. But there are many instances—hopefully not in a judicial setting—where hallucinations are circulated, believed, and become "fact" and "law" in some minds. We all must guard against those instances. As a federal district court recently noted: "There is no room in our court system for the submission of fake, hallucinated case citations, facts, or law. And it is entirely preventable by competent counsel who do their jobs properly and competently." (*Versant*, *supra*, 2025 WL 1440351, at *7.)

DISPOSITION

The judgment is affirmed. Attorney Amir Mostafavi is directed to pay $10,000 in sanctions, payable to the clerk of this court, no later than 30 days after the remittitur is filed. The clerk is directed to deposit this sum into the court's general fund.

Pursuant to Business and Professions Code section 6086.7, subdivision (a)(3), the clerk of the court is ordered to forward a copy of this opinion to the State Bar upon return of the remittitur. Mostafavi is ordered, within 15 days of the issuance of the remittitur, to provide a copy of this opinion to his client and to file a certification in this court that he has done so.

Respondents are awarded their appellate costs.

CERTIFIED FOR PUBLICATION

EDMON, P. J.

We concur:

EGERTON, J. KLATCHKO, J.*

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* Judge of the Superior Court of Riverside County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

FIRST DIVISION
BARNES, P. J.,
BROWN and WATKINS, JJ.

June 30, 2025

In the Court of Appeals of Georgia

A25A0196. SHAHID v. ESAAM.

WATKINS, Judge.

After the trial court entered a final judgment and decree of divorce, Nimat Shahid ("Wife") filed a petition to reopen the case and set aside the final judgment, arguing that service by publication was improper. The trial court denied the motion, using an order that relied upon non-existent case law. For the reasons discussed below, we vacate the order and remand for the trial court to hold a new hearing on Wife's petition. We also levy a frivolous motion penalty against Diana Lynch, the attorney for Appellee Sufyan Esaam ("Husband").

According to Wife's October 2023 verified petition to reopen case, Husband filed a complaint for divorce in April 2022, service was performed by publication, and

the trial court entered a final judgment in July 2022. In the petition, Wife averred that she had moved to Texas after she and Husband separated in July 2021 and that Husband failed to use reasonable diligence to determine her whereabouts before obtaining service by publication of his divorce complaint. Following a hearing, the superior court denied Wife's motion. We granted Wife's application for discretionary review, and this appeal followed.

1. Citing *Reynolds v. Reynolds*,[1] Wife argues that the superior court erred when it denied her petition to reopen the case and set aside the divorce decree because Husband did not make a sufficient showing of due diligence to allow service by publication under OCGA § 9-11-4 (f). Wife points out in her brief that the trial court relied on two fictitious cases in its order denying her petition, and she argues that the order is therefore, "void on its face."

In his Appellee's Brief, Husband does not respond to Wife's assertion that the trial court's order relied on bogus case law. Husband's attorney, Diana Lynch, relies on four cases in this division, two of which appear to be fictitious, possibly

[1] 296 Ga. 461 (769 SE2d 511) (2015).

"hallucinations" made up by generative-artificial intelligence ("AI"),[2] and the other two have nothing to do with the proposition stated in the Brief.[3]

Undeterred by Wife's argument that the order (which appears to have been prepared by Husband's attorney, Diana Lynch) is "void on its face" because it relies on two non-existent cases, Husband cites to 11 additional cites in response that are either hallucinated or have nothing to do with the propositions for which they are cited. Appellee's Brief further adds insult to injury by requesting "Attorney's Fees on Appeal" and supports this "request"[4] with one of the new hallucinated cases.

We are troubled by the citation of bogus cases in the trial court's order. As the reviewing court, we make no findings of fact as to how this impropriety occurred,

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[2] "AI hallucination is a phenomenon wherein a large language model (LLM)—often a generative AI chatbot or computer vision tool — perceives patterns or objects that are nonexistent or imperceptible to human observers, creating outputs that are nonsensical or altogether inaccurate." *Harris v. Adams*, 757 FSupp3d 111, 119 n.3 (D. Mass. 2024) (citing *What Are AI Hallucinations?*, IBM, https://www.ibm.com/think/topics/ai-hallucinations (last visited June 25, 2025)).

[3] See Appendix, infra, listing the 11 (out of 15) case citations contained in Appellee's Brief that fall into one of these two categories.

[4] The inclusion of this "request" in the body of the brief violates our rule that "[a]ll motions shall be filed as separate documents[.] No motions . . . shall be filed in the body of briefs[.]" Court of Appeals Rule 41 (b).

observing only that the order purports to have been prepared by Husband's attorney, Diana Lynch. We further note that Lynch had cited the two fictitious cases that made it into the trial court's order in Husband's response to the petition to reopen, and she cited additional fake cases both in that Response and in the Appellee's Brief filed in this Court.

As noted above, the irregularities in these filings suggest that they were drafted using generative AI. In his 2023 Year-End Report on the Federal Judiciary, Chief Justice John Roberts warned that "any use of AI requires caution and humility."[5] Roberts specifically noted that commonly used AI applications can be prone to "hallucinations," which caused lawyers using those programs to submit briefs with cites to non-existent cases.[6]

Although the present case may be the first occasion for a Georgia appellate court to confront the problems that can flow from a lawyer's apparent adoption of generative-AI, other courts have commented on the issue. In a 2023 opinion, a federal

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[5] Chief Justice John G. Roberts, Jr., U. S. Sup. Ct., 2023 Year-End Report on the Federal Judiciary 5 (2023), PDF available at: https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx.

[6] Id. at 5-6.

district court noted in *Mata v. Avianca, Inc.*, that "there is nothing inherently improper about using a reliable artificial intelligence tool for assistance. But existing rules impose a gatekeeping role on attorneys to ensure the accuracy of their filings."[7] In that case, the attorneys had abandoned their responsibilities when they submitted non-existent judicial opinions with fake quotes and citations created by the AI tool ChatGPT, then continued to stand by the fake opinions after judicial orders called their existence into question.[8]

Indeed,

> [m]any harms flow from the submission of fake opinions. The opposing party wastes time and money in exposing the deception. The Court's time is taken from other important endeavors. The client may be deprived of arguments based on authentic judicial precedents. There is potential harm to the reputation of judges and courts whose names are falsely invoked as authors of the bogus opinions and to the reputation of a party attributed with fictional conduct. It promotes cynicism about the legal profession and the American judicial system. And a future litigant

[7] 678 FSupp3d 443, 448 (SDNY 2023).

[8] Id.

> may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity.[9]

Here, as in *Mata*, Lynch's use of fictitious cases and citations has deprived the opposing party of the opportunity to appropriately respond to her arguments.

As to Lynch's request for attorney fees "for the costs incurred in responding to this appeal[,]" that section of Appellee's Brief provides:

> 1. OCGA § 9-15-14: This statute authorizes the recovery of attorney's fees if the court finds that an action, including an appeal, lacked substantial justification or was filed to delay or harass.
>
> 2. Johnson v. Johnson, 285 Ga. 408 (2009): The court awarded attorney's fees to the prevailing party in a divorce appeal, finding that the appeal was without merit and amounted to frivolous litigation.

We cannot find the cited case, *Johnson v. Johnson*, either by case name or citation. And, not surprisingly, we could not locate the case by its purported holding, which is a blatant misstatement of the law. More than 30 years ago, this Court held that "OCGA § 9-15-14 does not authorize the imposition of attorney fees and

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[9] (Footnote omitted.) *Mata*, 678 FSupp3d at 448-449; accord Matthew R. Caton, Features: Lawyers: Rely on "Generative AI" at Your Peril, 39 Maine Bar. J. 48 (2024).

expenses of litigation for proceedings before an appellate court of this state."[10] Since then, our Supreme Court has consistently and clearly reiterated this point multiple times: "attorney's fees incurred in connection with appellate proceedings are not recoverable under OCGA § 9-15-14."[11]

Moreover, it is worth pointing out that we granted Wife's application for discretionary review (Case Number A25D0396) which "established as a matter of fact and law that her appeal is not frivolous."[12] "As used in [OCGA § 9-15-14], 'lacked

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[10] *Dept. of Transp. v. Franco's Pizza & Delicatessen*, 200 Ga. App. 723, 728 (5) (409 SE2d 281) (1991), overruled on other grounds, *White v. Fulton County*, 264 Ga. 393, 394 (1) (444 SE2d 734) (1994); see also *Dismer v. Luke*, 228 Ga. App. 638, 640 (2) (492 SE2d 562) (1997) ("OCGA § 9-15-14 merely makes substantive and procedural provision for a *trial court*, *sitting as the trior of fact*, to make an award of attorney's fees and expenses of litigation as a sanction against certain enumerated abuses.") (citations and punctuation omitted; emphasis supplied).

[11] *McGahee v. Rogers*, 280 Ga. 750, 754 (2) (632 SE2d 657) (2006); accord *Rollins v. Rollins*, 300 Ga. 485, 489 (2) (796 SE2d 721) (2017) (directing that, on remand, "when the trial court considers anew the question of attorney fees under OCGA § 9-15-14, it should not award [Husband] any attorney fees incurred in connection with proceedings in [the appellate court] (whether in this appeal or previous appeals), as such attorney fees are not recoverable under OCGA § 9-15-14[ ]"); *Kautter v. Kautter*, 286 Ga. 16, 19 (4) (c) (685 SE2d 266) (2009) ("Attorney fees incurred in connection with appellate proceedings are not recoverable under OCGA § 9-15-14[.]").

[12] *Farmer v. State*, 216 Ga. App. 515, 521 (5) (c) (455 SE2d 297) (1995) (reversing supersedeas bond); see also *Long v. Truex*, 349 Ga. App. 875, 881 (3) (827

substantial justification' means substantially frivolous, substantially groundless, or substantially vexatious." OCGA § 9-15-14 (b). Thus, even if OCGA § 9-15-14 were an appropriate avenue to recover attorney fees for the costs of defending a frivolous appeal, our grant of Wife's application should have prompted Husband to reconsider his approach before filing the Appellee's Brief.

Under the circumstances and given the indisputably clear state of the law, Husband's attorney, Diana Lynch, cannot reasonably have believed, as the Appellee's Brief "requests," that this Court would "award attorney fees under OCGA § 9-15-14 for the costs incurred in responding to this appeal." Further, Lynch provided no other basis for an award of "attorney's fees to the prevailing party in a divorce appeal," other than a fictitious case, which purported to be a 2009 case from the Supreme Court of Georgia.

To be clear, we make no factual finding as to who (or what) inserted the fictitious cases into the superior court's order.[13] We are deeply troubled, however, that

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SE2d 66) (2019) (denying motion for sanctions under Court of Appeals Rule 7 (e) (2), having granted application for discretionary appeal and vacating the order at issue).

[13] See generally *Sunn v. Trophy Marine, Inc.*, 176 Ga. App. 68, 68-69 (1) (334 SE2d 884) (1985) ("The Court of Appeals is a court for the correction of errors of law only, and has no jurisdiction to hear evidence aliunde the record or to decide disputed

Lynch submitted to *this Court* an Appellee's Brief, completely ignoring the second of two arguments that Wife raised in her Appellant's Brief and Application for Discretionary Review (wherein Wife pointed out the two fictitious cases in the trial

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issues of fact.").

court's order),[14] and provided 11 bogus case citations[15] out of 15 total,[16] one of which was in support of a frivolous request for attorney fees.

Therefore, we impose a $2,500 frivolous motion penalty on Lynch, which is the most the law allows, pursuant to Court of Appeals Rule 7 (e) (2).[17] We have no

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[14] See Court of Appeals Rule 25 (b) ("If an appellee disagrees with the appellant's statement of the case in whole or in part, the appellee must identify any points of disagreements with supporting citations to the record.").

[15] See Appendix, infra, for a list of case citations.

[16] The percentage of bogus citations (73 percent of the 15 citations in the brief or 83 percent if the two bogus citations in the superior court's opinion and the five additional bogus citations in Husband's response to Wife's petition to reopen Case are included) is consistent with the use of a general purpose large-language model. According to a 2024 law review article:

> In attempting to find answers behind the phenomenon of the "hallucinations" to which generative AI seems prone, researchers at Stanford decided to test the technology. They measured more than 200,000 legal questions on OpenAI's ChatGPT 3.5, Google's PaLM 2, and Meta's Llama2 (all general purpose large-language models not built specifically for legal use). The researchers found that these large-language models hallucinate *at least seventy-five percent of the time* when answering questions about a court's core ruling.

John G. Browning, Robot Lawyers Don't Have Disciplinary Hearings Real Lawyers Do: The Ethical Risks and Responses in Using Generative Artificial Intelligence, 40 Ga. St. U. L. Rev. 917, 953 (2024) (emphasis supplied).

[17] See Court of Appeals Rule 7 (e) (2) ("The panel of the Court ruling on a case, with or without motion, may by majority vote to impose a penalty not to exceed

information regarding why Appellee's Brief repeatedly cites to nonexistent cases and can only speculate that the Brief may have been prepared by AI.

2. As to Wife's argument that the trial court erred by denying her petition to reopen case, we are unable to conduct meaningful review of that ruling.

In the Appellee's Brief, Husband argues that the superior court's factual findings are not reviewable because Wife failed to cause a transcript of the court's hearing to be included with the Record on Appeal.

It is true that "where an appeal is taken which draws in question the transcript of the evidence and proceedings, it shall be the duty of the appellant to have the transcript prepared at the appellant's expense."[18] Thus, the general rule is that "in the absence of a transcript or legal substitute for a transcript, "there is no evidence before [the appellate] court and the judgment of the trial court on evidentiary matters cannot be reviewed." However, this rule is based on the presumption that trial courts follow

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$2,500 against any party and/or a party's counsel in any civil case in which there is a direct appeal, application for discretionary appeal, application for interlocutory appeal, or motion that is determined to be frivolous."); see also Court of Appeals Rule 7 (a) (inherent power of Court).

[18] OCGA § 5-6-41 (c); see also *Holmes v. Roberson-Holmes*, 287 Ga. 358, 360-361 (1) (695 SE2d 586) (2010).

the law, and that presumption can be rebutted.[19] "[T]he absence of a transcript does not authorize such presumption of correctness when the record plainly shows harmful error."[20]

In this case, Wife has rebutted the presumption of regularity by pointing out that both of the cases cited in the order denying her petition to reopen *do not exist.*[21] Because the order denying her motion to set aside the divorce decree has a defect apparent on its face, we cannot conduct any meaningful appellate review of the merits of Wife's argument that the court lacked jurisdiction over her person.[22] Accordingly,

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[19] See *Infinite Energy, Inc. v. Cottrell*, 295 Ga. App. 306, 310 (5) (671 SE2d 294) (2008).

[20] *Freeway Junction*, 202 Ga. App at 706 (415 SE2d 312) (1992), overruled in part on other grounds by *Holmes*, 287 Ga. at 361 (1) n. 3 (distinguishing *Freeway Junction*, but overruling it to the extent this quote could be read to reject the presumption of regularity).

[21] See *Shuler v. Akpan*, 362 Ga. App. 810, 817-818 (870 SE2d 235) (2022) (holding that presumption of regularity was overcome by the record, despite the absence of a transcript of the default-judgment hearing, where the trial court found that service by publication was warranted because the sheriff and process server had been unable to perfect service on the "defendants" but the record was devoid of any evidence that plaintiff made diligent efforts to serve defendant prior to the grant of the motion for service of publication).

[22] See OCGA § 9-12-16 ("The judgment of a court having no jurisdiction of the person or the subject matter or which is void for any other cause is a mere nullity and may be so held in any court when it becomes material to the interest of the parties to

we vacate the order and remand for further proceedings consistent with this opinion. The superior court is specifically directed to hold a new hearing on Wife's motion to set aside the divorce decree.

3. In sum, we vacate the superior court's order and remand for further proceedings, including a new hearing on Wife's motion to reopen. We also impose a $2,500 penalty against Lynch. This penalty shall constitute a money judgment in favor of Wife (Nimat Shahid) against Husband's attorney (Diana Lynch), and the trial court is directed to enter judgment in such amount upon return of the remittitur in this case.[23]

Judgment vacated and case remanded. Barnes, P. J., and Brown, J., concur.

Appendix.

The following is a list of fictitious cases included in Appellee's Brief:

- *In the Interest of J. M. B.*, 296 Ga. 786 (2015)

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consider it.").

[23] See Court of Appeals Rule 7 (e) (3); *We Care Transp., Inc. v. Branch Banking & Trust Co.*, 335 Ga. App. 292, 298 (3) (780 SE2d 782) (2015) (applying former Court of Appeals Rule 15 (b)).

- *Miller v. Miller*, 288 Ga. 274 (702 SE2d 888) (2010)[24]
- *Brown v. Brown*, 264 Ga. 48 (1994)
- *Walker v. Georgia*, 309 Ga. 749 (2021)
- *Ramos v. Ramos*, 279 Ga. 487 (2005)
- *McRae v. McRae*, 263 Ga. 303 (1993)
- *Johnson v. Johnson*, 285 Ga. 408 (2009)

Appellee's Brief also contains four citations to real cases that have nothing to do with the proposition stated:

- *Blasingame v. Blasingame*, 249 Ga. 791 (294 SE2d 519) (1982)[25]

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[24] The Brief provides parallel case citations for three cases, which are three of the four case citations purportedly "Supporting Service by Publication" (given in lieu of the bogus *Epps* and *Hodge* case citations from the superior court's order): (1) The regional reporter citation given for *Miller v. Miller*, 702 SE2d 888, does not correspond with the Georgia Reports citation, 288 Ga. 274, but does correspond with another case involving a party named Miller: *Miller v. State*, 288 Ga. 286 (2010). However, the opinion in that criminal appeal has nothing to do with the proposition stated in the Brief for *Miller v. Miller*: "The court upheld service by publication where the husband's attempts to locate the wife were unsuccessful, and she had vacated the marital residence without providing a forwarding address." (2) *Blasingame v. Blasingame*, 249 Ga. 791 (294 SE2d 519) (1982) is a real case citation from a divorce appeal, but it had nothing to do with service by publication; contrary to what is said in Appellee's Brief, *Blasingame* did not "uph[o]ld service by publication where the defendant deliberately concealed their whereabouts to avoid service."

[25] See note 29, supra.

- *Wilson v. Wilson*, 282 Ga. 728 (2007)[26]
- *Brown v. Tomlinson*, 246 Ga. 513 (1980)[27]
- *Jones v. State*, 277 Ga. 36 (2003)[28]

Husband's Response to Wife's Petition to Reopen Case provides citations to seven cases, none of which appear to exist. In addition to the two hallucinated cases that made it into the trial court's order, the Response cites the following non-existent cases:

- *Fleming v. Floyd*, 237 Ga. 76 (226 SE2d 601) (1976)

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[26] According to Appellee's Brief, *Wilson* supports deference to the trial court, specifically "The trial court's findings of fact will not be set aside unless they are clearly erroneous, and the appellate court must defer to the trial court's ability to assess witness credibility." However, *Wilson* says nothing about appellate review of a trial court's factual findings. See 282 Ga. 728 (653 SE2d 702) (2007).

[27] According to Appellee's Brief, "[t]his case sets the precedent that in the absence of a transcript, the appellate court will defer to the lower court's findings. The appellate court cannot reverse factual determinations unless there is a manifest error." In *Brown v. Tomlinson*, 246 Ga. 513 (272 SE2d 258) (1980), the Supreme Court says nothing about the absence of a transcript or the appropriate level of deference to a lower court's findings.

[28] In this criminal appeal, the Supreme Court of Georgia had the trial transcript before it and said nothing related to the proposition in the brief: "Without a transcript, the appellate court cannot review what transpired at trial and must affirm the trial court's judgment unless the appellant can demonstrate error by other means." See 277 Ga. 36 (586 SE2d 224) (2003).

- *Christie v. Christie*, 277 Ga. 27 (586 SE2d 57) (2003)
- *Mobley v. Murray County*, 178 Ga. App. 320 (342 SE2d 780) (1986)
- *Robinson v. Robinson*, 277 Ga. 75 (586 SE2d 316) (2003)
- *Reynolds v. Reynolds*, 288 Ga. App. 688 (2008)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CHRISTOPHER KOHLS and MARY FRANSON, Plaintiffs, v. KEITH ELLISON, in his official capacity as Attorney General of Minnesota, and CHAD LARSON, in his official capacity as County Attorney of Douglas County, Defendants.	Case No. 24-cv-3754 (LMP/DLM) **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION TO EXCLUDE EXPERT TESTIMONY AND DENYING DEFENDANT'S MOTION FOR LEAVE TO FILE AN AMENDED EXPERT DECLARATION**

M. Frank Bednarz, **Hamilton Lincoln Law Institute, Chicago, IL**; and Douglas P. Seaton, James V. F. Dickey, and Alexandra K. Howell, **Upper Midwest Law Center, Minnetonka, MN**, for Plaintiffs.

Elizabeth C. Kramer, Peter J. Farrell, Angela Behrens, and Allen C. Barr, **Office of the Minnesota Attorney General, Saint Paul, MN**, for Defendant Keith Ellison, in his official capacity as Attorney General of Minnesota.

Kristin C. Nierengarten and Zachary J. Cronen, **Rupp, Anderson, Squires & Waldspurger, Minneapolis, MN**, for Defendant Chad Larson, in his official capacity as County Attorney of Douglas County.

Plaintiffs Christopher Kohls and Mary Franson (collectively, "Plaintiffs") move to exclude expert declarations offered by Defendant Keith Ellison, in his official capacity as Attorney General of Minnesota ("Attorney General Ellison"), in opposition to Plaintiffs' motion for a preliminary injunction. ECF No. 29. Recognizing errors in one of the declarations, Attorney General Ellison has moved for leave to file an amended declaration

by that expert. ECF No. 34. For the following reasons, Plaintiffs' motion is granted in part and denied in part, and Attorney General Ellison's motion is denied.

FACTUAL BACKGROUND

Minnesota law prohibits, under certain circumstances, the dissemination of "deepfakes" with the intent to injure a political candidate or influence the result of an election. *See* Minn. Stat. § 609.771. Plaintiffs challenge the statute on First Amendment grounds and seek preliminary injunctive relief prohibiting its enforcement. *See* ECF No. 10.

With his responsive memorandum in opposition to Plaintiffs' preliminary-injunction motion, Attorney General Ellison submitted two expert declarations: one from Jevin West, a Professor at the University of Washington who also serves as the Director of the Center for an Informed Public, an interdisciplinary research center dedicated to studying misinformation in the digital age (ECF No. 24 (the "West Declaration")); and another from Jeff Hancock, Professor of Communication at Stanford University and Director of the Stanford Social Media Lab (ECF No. 23 (the "Hancock Declaration")). The declarations generally offer background about artificial intelligence ("AI"), deepfakes, and the dangers of deepfakes to free speech and democracy. ECF No. 23 ¶¶ 7–32; ECF No. 24 ¶¶ 7–23.

Plaintiffs moved to exclude these declarations, arguing that they are conclusory and contradicted by the experts' prior writings. *See* ECF No. 30 at 9–34. Plaintiffs also alleged that Professor Hancock included fabricated material in his declaration. *Id.* at 4–9. After reviewing Plaintiffs' motion to exclude, Attorney General Ellison's office contacted

Professor Hancock, who subsequently admitted that his declaration inadvertently included citations to two non-existent academic articles, and incorrectly cited the authors of a third article. ECF No. 37 at 3–4. These errors apparently originated from Professor Hancock's use of GPT-4o—a generative AI tool—in drafting his declaration. ECF No. 39 ¶¶ 11, 21. GPT-4o provided Professor Hancock with fake citations to academic articles, which Professor Hancock failed to verify before including them in his declaration. *Id.* ¶¶ 12–14.

In response, Attorney General Ellison candidly acknowledged the fake citations in the Hancock Declaration while asserting that his office had no idea that the Hancock Declaration contained fake, AI-generated citations. ECF No. 38 ¶¶ 4–6. Because the deadline to submit his response to Plaintiffs' preliminary-injunction motion had already elapsed, Attorney General Ellison requested the Court's leave to file an amended Hancock Declaration, citing excusable neglect to allow the late filing. ECF Nos. 34, 37 at 4–5.

Plaintiffs oppose Attorney General Ellison's request to file an amended Hancock Declaration. ECF No. 42. Plaintiffs contend that the "excusable neglect" exception is not available to Attorney General Ellison because the substance of the Hancock Declaration would change and prejudice Plaintiffs. *Id.* at 6–10. Plaintiffs continue to maintain that the fake citations in the Hancock Declaration taint the entirety of Professor Hancock's opinions and render any opinion by him inadmissible. ECF No. 44 at 8–9.

ANALYSIS

"[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than a trial on the merits." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Accordingly, courts within this Circuit have noted

that the Federal Rules of Evidence—including Rule 702 and the related *Daubert* analysis—are either relaxed, *Cooke v. Randolph, Neb. City Council*, No. 8:23-cv-249 (JMG), 2023 WL 6519374, at *2 n.3 (D. Neb. Oct. 5, 2023), or inapplicable, *USA Visionary Concepts, LLC v. MR Int'l, LLC*, No. 4:09-cv-874 (DGK), 2009 WL 10672094, at *5 (W.D. Mo. Nov. 17, 2009), at the preliminary-injunction stage. *See also Guntert & Zimmerman Constr. Div., Inc. v. Gomaco Corp.*, No. 20-cv-4007 (CJW/KEM), 2020 WL 6948364, at *1 (N.D. Iowa Oct. 14, 2020) (explaining that affidavits submitted at the preliminary-injunction stage "need not meet the requirements of affidavits under . . . the Federal Rules of Evidence, but the Court may consider the 'competence, personal knowledge and credibility of the affiant' in determining the weight to give the evidence") (citation omitted); *Parks v. City of Charlotte*, No. 3:17-cv-00670-GCM, 2018 WL 4643193, at *4 (W.D.N.C. Sept. 27, 2018) ("[R]ather than making a final determination under Rule 702 and *Daubert* of whether [the proposed experts] qualify as experts for purposes of this trial, the Court will make a less formal review of the affidavits to see if they present the indicia of reliability common to expert testimony.").

Plaintiffs ask the Court to undertake a full *Daubert* analysis of the West and Hancock Declarations, ECF No. 30 at 9–21; ECF No. 42 at 4–8, but because the evidentiary rules at this juncture are "less formal" than at trial, the Court declines to do so. *Camenisch*, 451 U.S. at 395. Rather, the Court will evaluate the "competence, personal knowledge and credibility" of the West and Hancock Declarations. *Gomaco Corp.*, 2020 WL 6948364, at *1. Nevertheless, the line of cases under *Daubert* remain "useful guideposts" for

evaluating the credibility of the experts' opinions. *St. Michael's Media Inc. v. Mayor of Baltimore*, 566 F. Supp. 3d 327, 353–56 (D. Md. 2021).

I. West Declaration

As for the West Declaration, Plaintiffs argue that it is conclusory because it lacks a reliable methodology under *Daubert*. ECF No. 30 at 17–21. But *Daubert* does not apply with full force at the preliminary-injunction stage, *see Camenisch*, 451 U.S. at 395, and the Court is satisfied that the "competence, personal knowledge and credibility" of Professor West's testimony weigh in favor of admitting his declaration at this early stage. *Gomaco Corp.*, 2020 WL 6948364, at *1 (citation omitted) (internal quotation marks omitted). Moreover, as Attorney General Ellison points out, even under *Daubert*, experts may offer more "generalized testimony . . . to educate the factfinder on general principles." Fed. R. Evid. 702 advisory committee's note to 2000 amendment. The West Declaration largely fits this mold,[1] so to the extent that Plaintiffs criticize the declaration as "conclusory" or "generalized," the Court finds that the West Declaration is admissible for the purpose of educating this Court generally on AI, deepfakes, and the psychological and speech-related impacts of deepfakes.

The Court also rejects Plaintiffs' strained argument that the West Declaration contains legal conclusions. ECF No. 30 at 22–25. Although an expert may not testify as

[1] A portion of paragraph 23 of the West Declaration touches on applying Professor West's testimony to the facts of this case. But the majority of that paragraph simply provides background information on the psychological impacts of deepfakes and the impact of deepfakes on the marketplace of ideas, so the Court considers this paragraph for the purpose of obtaining helpful background knowledge on these issues.

to whether "a legal standard has been met," an expert "may offer his opinion as to facts that, if found, would support a conclusion that the legal standard at issue was satisfied." *Scalia v. Reliance Trust Co.*, No. 17-cv-4540 (SRN/ECW), 2021 WL 795270, at *19 (D. Minn. Mar. 2, 2021) (citation omitted). Here, Plaintiffs take issue with the West Declaration's discussion of the shortcomings of counterspeech to respond to deepfakes. But whether counterspeech is effective in combatting deepfakes is not a legal standard; rather, it is a fact relevant to the ultimate legal inquiry here: the First Amendment means-fit analysis. *See* ECF No. 11 at 29–31 (Plaintiffs analyzing the availability of counterspeech within the means-fit analysis of their preliminary-injunction briefing). The West Declaration does not offer an impermissible legal conclusion because nowhere does Professor West testify whether "a legal standard has been met." *Scalia*, 2021 WL 795270, at *19.

Plaintiffs finally argue that the West Declaration contradicts Professor West's 2020 book about misinformation because in that book, Professor West purportedly dismissed the idea of regulating misinformation. ECF No. 30 at 27–30. As an initial matter, this would not justify excluding the West Declaration, as "the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility," and "[o]nly if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded." *Hartley v. Dillard's, Inc.*, 310 F.3d 1054, 1061 (8th Cir. 2002) (citation omitted) (internal quotation marks omitted). As to credibility, the Court gives little weight to Plaintiffs' argument because Professor West's book was written over four

years ago, and it is plausible that in the fast-changing world of AI technology, his expert opinion has evolved in that four-year gap.

Moreover, the Court discerns some selective quotation on Plaintiffs' part. For example, Plaintiffs quote a passage from the book about the regulation of misinformation: "it runs afoul of the First Amendment to the US Constitution, which guarantees freedom of speech." ECF No. 31-7 at 12. But later in the same paragraph—in a passage that Plaintiffs do not quote—Professor West and his co-author recognize that "[f]or a democracy to function properly, a country needs an informed populace with access to reliable information," and concludes that such an argument "could justify governmental regulation of social media." *Id.* This passage alone undermines Plaintiffs' assertion that Professor West's 2020 book categorically dismisses the possibility of regulating misinformation.

In sum, the Court finds that the "competence, personal knowledge and credibility" of the West Declaration weigh in favor of its admissibility at this stage. *Gomaco Corp.*, 2020 WL 6948364, at *1. Plaintiffs' motion to exclude the West Declaration—whether in whole or in part—is therefore denied. The Court will consider the West Declaration in ruling on Plaintiffs' preliminary-injunction motion.

II. Hancock Declaration

The Hancock Declaration is a different matter. Attorney General Ellison concedes that Professor Hancock included citations to two non-existent academic articles and incorrectly cited the authors of a third article. ECF No. 37 at 3–4. Professor Hancock admits that he used GPT-4o to assist him in drafting his declaration but, in reviewing the

declaration, failed to discern that GPT-4o generated fake citations to academic articles. ECF No. 39 ¶¶ 11–14, 21.

The irony. Professor Hancock, a credentialed expert on the dangers of AI and misinformation, has fallen victim to the siren call of relying too heavily on AI—in a case that revolves around the dangers of AI, no less. Professor Hancock offers a detailed explanation of his drafting process to explain precisely how and why these AI-hallucinated citations in his declaration came to be. *Id.* ¶¶ 10–22. And he assures the Court that he stands by the substantive propositions in his declaration, even those that are supported by fake citations. *Id.* ¶ 22. But, at the end of the day, even if the errors were an innocent mistake, and even if the propositions are substantively accurate, the fact remains that Professor Hancock submitted a declaration made under penalty of perjury with fake citations. It is particularly troubling to the Court that Professor Hancock typically validates citations with a reference software when he writes academic articles but did not do so when submitting the Hancock Declaration as part of Minnesota's legal filing. ECF No. 39 ¶ 14. One would expect that greater attention would be paid to a document submitted under penalty of perjury than academic articles. Indeed, the Court would expect greater diligence from attorneys, let alone an expert in AI misinformation at one of the country's most renowned academic institutions.

To be clear, the Court does not fault Professor Hancock for using AI for research purposes. AI, in many ways, has the potential to revolutionize legal practice for the better. *See* Damien Riehl, *AI + MSBA: Building Minnesota's Legal Future*, 81-Oct. Bench & Bar of Minn. 26, 30–31 (2024) (describing the Minnesota State Bar Association's efforts to

explore how AI can improve access to justice and the quality of legal representation). But when attorneys and experts abdicate their independent judgment and critical thinking skills in favor of ready-made, AI-generated answers, the quality of our legal profession and the Court's decisional process suffer.

The Court thus adds its voice to a growing chorus of courts around the country declaring the same message: verify AI-generated content in legal submissions! *See Mata v. Avianca, Inc.*, 678 F. Supp. 3d 443, 466 (S.D.N.Y. 2023) (sanctioning attorney for including fake, AI-generated legal citations in a filing); *Park v. Kim*, 91 F.4th 610, 614–16 (2d Cir. 2023) (referring attorney for potential discipline for including fake, AI-generated legal citations in a filing); *Kruse v. Karlan*, 692 S.W.3d 43, 53 (Mo. Ct. App. 2024) (dismissing appeal because litigant filed a brief with multiple fake, AI-generated legal citations).

To be sure, Attorney General Ellison maintains that his office had no idea that Professor Hancock's declaration included fake citations, ECF No. 38 ¶¶ 4–6, and counsel for the Attorney General sincerely apologized at oral argument for the unintentional fake citations in the Hancock Declaration. The Court takes Attorney General Ellison at his word and appreciates his candor in rectifying the issue. But Attorney General Ellison's attorneys are reminded that Federal Rule of Civil Procedure 11 imposes a "personal, nondelegable responsibility" to "validate the truth and legal reasonableness of the papers filed" in an action. *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 126–27 (1989). The Court suggests that an "inquiry reasonable under the circumstances," Fed. R. Civ. P. 11(b), may

now require attorneys to ask their witnesses whether they have used AI in drafting their declarations and what they have done to verify any AI-generated content.

The question, then, is what to do about the Hancock Declaration. Attorney General Ellison moves for leave to file an amended version of the Hancock Declaration, ECF No. 34, and argues that the Court may still rely on the amended Hancock Declaration in ruling on Plaintiffs' preliminary-injunction motion. Plaintiffs seem to accept that Professor Hancock is qualified to render an expert opinion on AI and deepfakes, and the Court does not dispute that conclusion. *See* ECF No. 30 at 4 (accepting that Professors Hancock and West "are well-published in their fields"). Nevertheless, Plaintiffs argue that the Hancock Declaration should be excluded in its entirety and that the Court should not consider an amended declaration. ECF No. 44 at 3. The Court agrees.

Professor Hancock's citation to fake, AI-generated sources in his declaration—even with his helpful, thorough, and plausible explanation (ECF No. 39)—shatters his credibility with this Court. At a minimum, expert testimony is supposed to be reliable. Fed. R. Evid. 702; *see also Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993) (explaining that expert testimony must be "not only relevant, but reliable"). More fundamentally, signing a declaration under penalty of perjury is not a mere formality; rather, it "alert[s] declarants to the gravity of their undertaking and thereby have a meaningful effect on truth-telling and reliability." *Acosta v. Mezcal, Inc.*, No. 17-cv-0931 (JKB), 2019 WL 2550660, at *2 (D. Md. June 20, 2019); *see also In re World Trade Ctr. Disaster Site Litig.*, 722 F.3d 483, 488 (2d Cir. 2013) (explaining that the "under penalty of perjury" affirmation "impresses upon the declarant the specific punishment to which he or she is subjected for

certifying to false statements"). The Court should be able to trust the "indicia of truthfulness" that declarations made under penalty of perjury carry, but that trust was broken here. *Davenport v. Bd. of Trs. of State Ctr. Comm. Coll. Dist.*, 654 F. Supp. 2d 1073, 1083 (E.D. Cal. 2009).

Moreover, citing to fake sources imposes many harms, including "wasting the opposing party's time and money, the Court's time and resources, and reputational harms to the legal system (to name a few)." *Morgan v. Cmty. Against Violence*, No. 23-cv-353-WPJ/JMR, 2023 WL 6976510, at *8 (D.N.M. Oct. 23, 2023). Courts therefore do not, and should not, "make allowances for a [party] who cites to fake, nonexistent, misleading authorities"—particularly in a document submitted under penalty of perjury. *Dukuray v. Experian Info. Sols.*, 23 Civ. 9043 (AT) (GS), 2024 WL 3812259, at *11 (S.D.N.Y. July 26, 2024) (quoting *Morgan*, 2023 WL 6976510, at *7). The consequences of citing fake, AI-generated sources for attorneys and litigants are steep. *See Mata*, 678 F. Supp. 3d at 466; *Park*, 91 F.4th at 614–16; *Kruse*, 692 S.W.3d at 53. Those consequences should be no different for an expert offering testimony to assist the Court under penalty of perjury.

To be sure, the Court does not believe that Professor Hancock intentionally cited to fake sources, and the Court commends Professor Hancock and Attorney General Ellison for promptly conceding and addressing the errors in the Hancock Declaration. But the Court cannot accept false statements—innocent or not—in an expert's declaration submitted under penalty of perjury. Accordingly, given that the Hancock Declaration's errors undermine its competence and credibility, the Court will exclude consideration of Professor Hancock's expert testimony in deciding Plaintiffs' preliminary-injunction

motion. *Gomaco Corp.*, 2020 WL 6948364, at *1. Because the Court declines to consider Professor Hancock's testimony in deciding Plaintiffs' preliminary-injunction motion, the Court will deny as moot Attorney General Ellison's motion for leave to file an amended Hancock Declaration.

CONCLUSION

Based upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Plaintiffs' Motion to Exclude Expert Testimony (ECF No. 29) is **GRANTED IN PART AND DENIED IN PART**. The motion is granted as to the Hancock Declaration and denied as to the West Declaration.

2. Defendants' Motion for Leave to File an Amended Expert Declaration (ECF No. 34) is **DENIED AS MOOT**.

Dated: January 10, 2025

s/Laura M. Provinzino
Laura M. Provinzino
United States District Judge

AI Hallucination Cases

This database tracks legal *decisions*[1] in cases where generative AI produced hallucinated content – typically fake citations, but also other types of AI-generated arguments. It does not track the (necessarily wider) universe of all fake citations or use of AI in court filings.

While seeking to be exhaustive (**507** cases identified so far), it is a work in progress and will expand as new examples emerge. This database has been featured in news media, and indeed in several decisions dealing with hallucinated material.[2]

If you know of a case that should be included, feel free to contact me.[3]

For weekly takes on cases like these, and what they mean for legal practice, subscribe to Artificial Authority.

Click to Download CSV

Search cases, courts

State

Case	Court / Jurisdiction	Date ▼	Party Using AI	AI Tool ⓘ	Nature of Hallucination	Outcome / Sanction
In re: Tracy Johnson	CA Texas (USA)	30 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (1)	Warning
In re: Pamela Williams	N.D. Georgia (Bankruptcy) (USA)	30 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (1)	
Lareina A. Sauls v. Pierce County, et al.	W.D. Washington (USA)	30 October 2025	Pro Se Litigant	Implied	**Misrepresented** Case Law (1)	Warning
Nonnie Berg v. United Airlines, Inc.	D. Colorado (USA)	30 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (5), Exhibits or Submissions (1)	Warning
Mezu v. Mezu	CA Maryland (USA)	29 October 2025	Lawyer	ChatGPT	**Fabricated** Case Law (1) **False Quotes** Case Law (1) **Misrepresented** Case Law (1)	Referral to Attorney Grievance Commission
Source: Robert Freund						
Joy Wilson v. KIPP Texas, Inc.	N.D. Texas (USA)	29 October 2025	Lawyer	ChatGPT	**False Quotes** Exhibits or Submissions (1)	Costs Order; 2h of CLE
Source: Robert Freund						
Robert Cole Stemkowski Goldman v. Arizona Board of Regents	D. Arizona (USA)	29 October 2025	Lawyer	Implied	**Fabricated** Case Law (1) **False Quotes** Case Law (1) **Misrepresented** Case Law (1)	Show Cause Order

Argentina (3)
Australia (32)
Austria (1)
Belgium (2)
Brazil (8)
Canada (39)
Czech Republic (1)
Germany (3)
India (3)
International Arbitration (1)
Ireland (4)
Israel (29)
Italy (4)
Netherlands (3)
New Zealand (3)
Singapore (2)
South Africa (3)
Spain (1)
Tanzania (1)
The Bahamas (1)
Trinidad & Tobago (1)
UK (18)
USA (340)
Zimbabwe (1)

Party

Source: Jesse Schaefer						
Ronald H. Foster v. Author Success Publishing, et al.	M.D. Alabama (USA)	29 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (1) **False Quotes** Case Law (1)	Show Cause Order
Source: Jesse Schaefer						
In re Jackson Hospital & Clinic, Inc., et al.	M.D. Alabama (Bankruptcy) (USA)	28 October 2025	Lawyer	Unidentified	**Fabricated** Case Law (1) **False Quotes** Case Law (1) **Misrepresented** Legal Norm (1)	
Saber v. Navy Federal Credit Union	SC Pennsylvania (USA)	28 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (2)	Warning
Ryan Andrew Nelson v. State Farm Fire and Casualty Company	S.D. Georgia (USA)	28 October 2025	Pro Se Litigant	Unidentified	**Fabricated** Case Law (1)	
Green Building Initiative, Inc. v. Stephen R. Peacock & Green Globe Limited	D. Oregon (USA)	27 October 2025	Lawyer	Implied	**Fabricated** Case Law (2)	Show Cause Order
Source: Volokh						
U.S. Bank National Association v. Richmond	D. Maine (USA)	27 October 2025	Pro Se Litigant	Implied	**Misrepresented** Exhibits or Submissions (1)	Show Cause Order
In re: Sherry Ann McGann	D. Colorado (Bankruptcy) (USA)	27 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (1)	
Crowder v. Yussman	CA Kentucky (USA)	24 October 2025	Lawyer	Implied	**Fabricated** Case Law (3)	Warning
In re: Sanctions Order of Kenney	CA Louisiana (USA)	23 October 2025	Lawyer	ChatGPT, Microsoft Copilot, Google	**Fabricated** Case Law (3) **False Quotes** Case Law (1) **Misrepresented** Case Law (1)	Costs order, 3 hours CLE on ethical use of generative AI, referral to Office of Disciplinary Counsel
Corey v. Kenneh	SC North Dakota (USA)	22 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (1)	Affirmed sanctions from lower court
Re Sriram (aka Roy)	High Court (UK)	22 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (1)	Warning
University Mall v. Okorie et al.	S.D. Mississippi (USA)	22 October 2025	Pro Se Litigant	Unidentified	**Fabricated** Case Law (1) **False Quotes** Case Law (1)	Civil contempt
Mattox v. Product Innovation Research	E.D. Oklahoma (USA)	22 October 2025	Lawyer	ChatGPT	**Fabricated** Case Law (7) **False Quotes** Case Law (2) **Misrepresented** Case Law (3)	Pleadings struck; public reprimands; monetary sanctions; remedial filing and certification

Expert (6)

Federal Defender (1)

Judge (5)

Lawyer (209)

Paralegal (3)

Prosecutor (1)

Pro Se Litigant (283)

From period: Q2 2023

Nature – Category

Fabricated (385)

False Quotes (139)

Misrepresented (218)

Outdated Advice (15)

Nature – Subcategory

Case Law (403)

Doctrinal Work (15)

Exhibits & Submissions (46)

Legal Norm (74)

Other (6)

Overturned Case Law (7)

Repealed Law (8)

Monetary sanction

Disciplinary Referral

						requirements
N-BAR Trade v. Amazon	D.C. DC (USA)	22 October 2025	Lawyer	Implied	**Fabricated** Case Law (1) **False Quotes** Case Law (1)	Warning
Alexandria Jones v. DC Office of Unified Communications	D.C. DC (USA)	22 October 2025	Lawyer	Implied	**False Quotes** Case Law (1)	Warning
John Weaver v. Shasta Services	W.D. Pennsylvania (USA)	22 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (2)	
Guardian Piazza D'Oro LLC v. Ward Ozaeta	CA California (USA)	22 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (1)	
Richard M. Zelma v. Wonder Group Inc.	D. New Jersey (USA)	22 October 2025	Pro Se Litigant	Unidentified	**Fabricated** Case Law (1) **False Quotes** Case Law (2)	Sanctions deferred
In re Bittrex	D. Delaware (USA)	22 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (3) **Misrepresented** Case Law (1)	
Pete v. Facebook Meta Platforms	E.D. Texas (USA)	22 October 2025	Pro Se Litigant	Implied	**False Quotes** Case Law (2)	
Wu v. Murray	CA British Columbia (Canada)	21 October 2025	Pro Se Litigant	Unidentified	**Fabricated** Case Law (2)	Costs order took hallucinations into account
Thomas Joseph Goddard v. Sares-Regis Group, Inc., et al.	N.D. California (USA)	21 October 2025	Pro Se Litigant	Implied	**Fabricated** Exhibits or Submissions (2) **Misrepresented** Exhibits or Submissions (1)	
Leila Kasso v. Police Officers' Federation of Minneapolis	D. Minnesota (USA)	21 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (2) **False Quotes** Case Law (1) **Misrepresented** Case Law (2)	Warning
Megan Cowden v. US Treasury & IRS	E.D. Missouri (USA)	20 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (1) **False Quotes** Case Law (1)	
Tippecanoe County Assessor v. Craig Goergen	Indiana Tax Court (USA)	17 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (1)	Warning
Artur Sargsyan v. Amazon.com Inc.	W.D. Washington (USA)	17 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (1)	Warning
Mitchell Taylor Button et al. v. John Jimison	W.D. Washington (USA)	17 October 2025	Lawyer	Implied	**Fabricated** Case Law (2) **False Quotes** Case Law (4)	Order include signed certification

Hanson v. Nest Home Lending, LLC et al.	D. Colorado (USA)	17 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (5) **False Quotes** Case Law (2) **Misrepresented** Case Law (4), Legal Norm (1)	Show Cause Order
Safe Choice, LLC v. City of Cleveland	N.D. Ohio (USA)	17 October 2025	Lawyer	Amicus (Casemine)	**Fabricated** Case Law (4) **Misrepresented** Case Law (6)	Monetary Sanction; Referral to the Bar; Order to serve decision on clinet;
Twyla Leach Minnesota DHS et al.	D. Minnesota (USA)	17 October 2025	Pro Se Litigant	Implied	**False Quotes** Case Law (1)	Warning
Gittemeier v. Liberty Mutual Personal Insurance Company	E.D. Missouri (USA)	16 October 2025	Lawyer	Implied	**Fabricated** Case Law (2) **Misrepresented** Case Law (1), Doctrinal Work (1)	Show Cause Order
Source: Volokh						
Serafin v. United States Department of State, et al.	E.D. Missouri (USA)	16 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (3) **Misrepresented** Case Law (2)	Warning
Conrad Smith et al. v. Donald J. Trump et al.	D.C. D.C. (USA)	16 October 2025	Lawyer	Implied	**Fabricated** Legal Norm (1) **False Quotes** Legal Norm (1)	Show Cause Order
X.L. v. Z.L. et al	Ontario SCJ (Canada)	16 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (2) **Misrepresented** Case Law (6)	No reliance on authorities submitted; AI use to be a factor in costs submissions
Polinski v. USA	US Court of Federal Claims (USA)	15 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (3)	Warning
Nima Ghadimi v. Arizona Bank & Trust, et al.	D. Arizona (USA)	15 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (2)	Warning
Charles C. Force v. Capital One, N.A., et al.	M.D. Florida (USA)	15 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (3) **False Quotes** Case Law (1) **Misrepresented** Case Law (2) **Outdated Advice** Overturned Case Law (1)	Filings stricken; Show Cause Order
Provincia del Chubut v. PRA	Chubut (Argentina)	15 October 2025	Judge	Implied	**Misrepresented** other (1)	Judgment annuled, new trial before different judge ordered
Lugasi (Aklim Systems) v. Netivot	Beersheba Magistrate's	15 October	Pro Se Litigant	ChatGPT		No reliance on hallucinated

Municipality	Court (Israel)	2025			**Fabricated** Exhibits or Submissions (1)	material
YK v. The High State Prosecutor's Office in Prague)	Supreme Administrative Court (Czech Republic)	15 October 2025	Lawyer	Implied	**Fabricated** Case Law (1) **False Quotes** Case Law (1)	
Yasiel Puig Valdes v. All3Media America, LLC, et al.	SCA California (Los Angeles) (USA)	15 October 2025	Lawyer	ChatGPT	**Fabricated** Case Law (2)	Referral
Source: Volokh						
T.B. v K.M.	King's Bench for Saskatchewan (Canada)	15 October 2025	Pro Se Litigant	Implied	**Fabricated** Case Law (5)	Court declined to award costs to applicant; portions of the reply brief were struck; admonishment
Robert Allen Reed et al. v. Community Health Care et al.	W.D. Washington (USA)	14 October 2025	Pro Se Litigant	implied	**Fabricated** Case Law (5)	Warning

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ARTIFICIAL INTELLIGENCE

Legal Issues, Policy, and Practical Strategies

Cynthia H. Cwik, Christopher A. Suarez,
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Chapter 3

AI and Ethics: A Lawyer's Professional Obligations

Lucian T. Pera, John F. Weaver, and Andrew P. Sutton

I. The Use of AI as an Ethics Issue

More so than ever before, attorneys rely on technology to practice law. Attorneys also counsel clients on the legal use of technology and represent clients in disputes concerning technology. To competently provide counsel in the face of accelerating technological change, attorneys are required to stay abreast of not only how new technology works but also how it affects lawyers' professional obligations.

Over the last two generations, attorneys, regulators, and courts have struggled to fit new technologies—from fax machines and computers to cell phones and the internet—into the traditional framework of professional obligations and regulation of lawyers. The explosive debut of ChatGPT in November 2022 brought generative AI to the forefront of public consciousness and began the stunningly swift incorporation of generative AI into a wide variety of legal tools. Attorneys and their clients have been equally swift to adopt tools that use or incorporate AI. Consequently, attorneys are eager for guidance on their professional obligations and the ethical use of AI tools.

As of this writing in spring 2024, guidance for lawyers is sparse. Only one ethics opinion specifically addresses attorney use of AI-driven tools, Florida Bar Ethics Opinion 24-1 (Jan. 19, 2024).[1] Few legal decisions touch

on the topic,[2] with the most notable exception being the headline-grabbing sanctions decision in *Mata v. Avianca, Inc.*,[3] in which a lawyer was sanctioned—and publicly shamed—for filing with a U.S. district court a ChatGPT-drafted court filing that included fake case citations. The moral most observers have drawn from these cases was that lawyers using AI applications, programs, systems, software, and platforms (each an AI tool and collectively AI tools) are professionally obligated to understand and use them competently, as they are required to understand and use any other tool competently.

The authors attempt here to provide a bit more guidance, tied to existing law and rules, in anticipation of further guidance from ethics opinions, case law, and other sources.

As the use of AI by lawyers and their clients becomes more widespread, the authors realize that the reach and limits of any ethics guidance addressing the use of AI tools will change. Lawyers will likely, however, be required to exercise due care in being aware of the use or incorporation of AI into tools or services that they and their clients use, as that use may or may not be obvious. Thus, even knowing when to apply the kind of guidance this chapter seeks to provide seems likely to become an aspect of diligent, prudent, and ethical lawyering.

II. Sources of a Lawyer's Professional Conduct Obligations

The professional obligations of attorneys arise from many sources.

A. The Applicable Standard of Care

Attorneys are generally required, under the law governing legal malpractice, to comply with the applicable standard of care when they provide legal services.[4] The standard of care provides the test for whether an attorney was negligent. While many formulations of the standard of care applicable to attorneys exist, one version requires that an attorney exercise "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction."[5]

Significantly, it is well established that the standard of care changes and evolves with changes in technology. In one famous 1932 decision often taught

in law school, *The T.J. Hooper*, famed judge Learned Hand specifically concluded that a tugboat owner's failure to use the latest technology—radio receivers to hear warnings of storms—could amount to a breach of the standard of care, even though their use was by no means universal.[6]

Without the benefit of any decisions addressing this point specifically as yet, there is little doubt that incorporating AI tools into legal practice without the required competence, leading to injury to a client, could violate the applicable standard of care, whether current or future versions of AI tools are at issue.[7]

B. Fiduciary Duty and Statutory Law

Another source of an attorney's professional obligations to clients is the common law of fiduciary duty, as well as statutory remedies available in various jurisdictions for some attorney misconduct, including laws prohibiting unfair and deceptive trade practices. An attorney's fiduciary duty to a client is generally comprised of the duties of confidentiality and loyalty but also may include duties that directly implicate competence.[8] In some jurisdictions, attorneys are also subject to liability based on specific statutory provisions of various kinds.[9] Little imagination is required to conclude that an attorney's use of AI tools could lead to liability for breach of fiduciary duty. For example, mishandling confidential information in using an AI tool could lead to unintended disclosure, or using an AI tool in a way inconsistent with an attorney's representations to a client could violate an unfair or deceptive trade practice statute.

C. Contract

An attorney's contractual obligations to clients are deeply embedded in virtually every attorney-client relationship. These are most often measured by the attorney's engagement agreement.

Increasingly over the last decade, clients—especially larger corporate clients and those in heavily regulated industries—have imposed much more specific contractual obligations on attorneys, not only on such subjects as billing practices but also on conflicts of interest and information technology and security. Since 2022, these "outside counsel guidelines" have begun to include provisions addressing the use of AI tools. Attorneys who agree to

such outside counsel guidelines have contractual obligations concerning their use of AI tools.

D. Court Rules

Since the November 2022 debut of ChatGPT, and especially since the highly publicized sanctions order in *Mata v. Avianca, Inc.*,[10] several courts have enacted local rules and issued standing orders or other guidance to lawyers appearing before them, requiring that the use of AI tools be disclosed.[11] These efforts raise numerous questions about their meaning, reach, and effectiveness, but it is too soon to tell whether many other courts will follow suit.

E. Other Law

Other laws of more general applicability may apply to lawyers in their work representing clients or in the operation of their practices. In this chapter, the authors merely remind attorneys that they cannot remain unaware that new and emerging regulation of AI and its use may well apply.

F. Ethics Rules

A lawyer's work is directly regulated by rules of professional conduct. This section addresses the specific ethics rules that are implicated by the use of AI tools.

Every U.S. jurisdiction has adopted rules of professional conduct based upon the American Bar Association Model Rules of Professional Conduct (ABA Model Rules). The extent to which the jurisdictions have adopted the precise language of the ABA Model Rules varies from rule to rule,[12] but on the issues discussed here, there is great uniformity in the substance of U.S. jurisdictions' rules. To date, no U.S. jurisdiction has adopted any ethics rule that specifically addresses issues arising from the use of AI tools.

1. Competence (ABA Model Rule 1.1)

ABA Model Rule 1.1 requires an attorney to "provide competent representation to a client," further providing that "[c]ompetent representation

requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Comment [8] to ABA Model Rule 1.1 notes an attorney's obligation to acquire and maintain competence through continuous education: "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject" (emphasis added). This comment was amended in 2012 to add the emphasized language and highlight that this duty of competence requires lawyers to educate themselves about the technology they use in their practice. This added language has been adopted in at least 39 jurisdictions.[13]

There is no doubt that this requirement of competence includes more than knowledge of the law and technical expertise in how to use the law to obtain results for clients in court or in transactions. Competence as required by the rule also requires competence in other tasks necessary to, or actually used in, the practice of law and the representation of clients.

For example, as cybersecurity concerns have increased, the ABA Standing Committee on Ethics and Professional Responsibility has interpreted ABA Model Rule 1.1 (and other rules) to mean that an attorney's failure to competently protect client confidential information from attempts by malicious actors to gain unauthorized access or a failure to protect against inadvertent disclosure can, in certain circumstances, amount to a violation of the ABA Model Rule.[14]

Florida Bar Ethics Opinion 24-1 puts it succinctly: "When using a third-party generative AI program, lawyers must sufficiently understand the technology to satisfy their ethical obligations."[15] The opinion goes on to note that this "specifically includes knowledge of whether the program is 'self-learning,'" which "raises the possibility that a client's information may be stored within the program and revealed in response to future inquiries by third parties," thus implicating confidentiality obligations.[16]

2. Diligence (ABA Model Rule 1.3)

Consideration of the ethical use of emerging technologies demonstrates the close relationship between an attorney's ABA Model Rule 1.1 duty of competence and an attorney's ABA Model Rule 1.3 duty of diligence. To

"act with reasonable diligence" in the representation of a client, not only does an attorney need to have a reasonable understanding of how a technology the attorney is using operates, but also the lawyer must engage in the "continuous application of legal reasoning and analysis regarding all the potential options and impacts presented . . . ."[17] To act with the required diligence in using an AI tool, an attorney must reasonably understand its capabilities and limits, as well as the risks and benefits of using it. And while the line between a lawyer's obligation of competence under ABA Model Rule 1.1 and a lawyer's obligation of diligence under Rule 1.3 may be less than clear, it is clear that a lawyer has these duties, perhaps even under both rules.

Prior to using an AI tool, an attorney should reasonably understand what AI is; how AI operates; what the limitations of AI are; and the risks of using the AI tool, including the risk that the AI tool in question may produce a result or information that is false, inaccurate, biased, incomplete, or inappropriate.[18] An attorney's duties with respect to the output of an AI tool are no different than an attorney's duties with respect to any other work product not produced directly by the lawyer, whether produced by an associate or paralegal, a book of forms, or a computer-assisted research service. An attorney must carefully and closely review and evaluate the output of any AI tool to confirm the accuracy and applicability of all information and guidance. Furthermore, an attorney should understand the particular risks and benefits of each AI tool for each use to which the lawyer puts it.

The ways in which a lawyer may learn, understand, and evaluate these risks and benefits may include

1. reading the terms of use, privacy policy, and related documents for each application, including terms on confidentiality;
2. investigating and understanding the scope and content of the data that was used to train the AI tool;
3. understanding the AI tool's data pathways, including (a) whether the AI tool retains the user's queries, input, or user tracking information and use statistics and whether it shares that information with other users; (b) how and where the AI tool stores such information or data; (c) how long the AI tool stores such information or data; (d) how such data can be used or accessed by the AI tool for training or other

analytical purposes; and (e) how such data may be accessed by the software company that owns the AI tool, third parties, partners, delegates, or contractors;

4. knowing the parties responsible for the AI tool and their experience, competence, and reputation; and
5. conducting a due diligence review of each AI tool, including researching reviews and critiques of its strengths and weaknesses, industry standards, and alternatives.

As with every other tool ever used by lawyers, there may well be no substitute for a lawyer's experience using a particular AI tool in real-world situations.

Florida Bar Ethics Opinion 24-1 provides a similar overview of a lawyer's due diligence obligations for AI tools and usefully situates this obligation within two decades of ethics opinions providing guidance on the use of new technologies such as cloud storage and computing, remote paralegal services, electronic storage disposal, and metadata.[19]

3. Client Communications (ABA Model Rule 1.4)

With the burgeoning development of AI tools, the field of AI is in flux, as software developers race to incorporate new features and capabilities into their platforms and applications. The range of AI tools available to attorneys and the integration of AI tools into platforms that attorneys or law firms utilize daily, such as Google or Microsoft Word, will likely make the use of AI tools common in the legal workplace.

ABA Model Rule 1.4 emphasizes the importance of communication between attorneys and their clients. An attorney must "reasonably consult with the client about the means to be used to accomplish the client's objectives." Comment [5] advises that a client should have "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Additionally, an attorney must "promptly inform the client of any decision or circumstance" that requires the client's informed consent. ABA Model Rule 1.0(e) defines informed consent as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information

and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."

Attorneys who use AI tools should consider disclosing their use to clients.[20] An attorney should be able to clearly communicate the "availability, effectiveness, risk, and overall impact on costs of relevant AI systems" to the client.[21] Generally, the accepted interpretation of ABA Model Rule 1.4 requires that a lawyer disclose to a client material developments in the client's representation. This would suggest that some uses of AI would qualify as such a material development. Perhaps using an AI tool to create a list of possible medical specialists to serve as expert witnesses in a case might not need to be disclosed, while using another AI tool to develop a range of predicted verdicts in the same case might well require some disclosure if the lawyer or client intended to rely on those predictions.

Depending on the circumstances, attorneys may need to disclose to clients how digital confidential client information is stored or accessed by third-party vendors or service providers, including providers of AI tools.[22] Attorneys who have incorporated AI tools into their practices might consider including a statement in their client engagement letters or client intake materials that discloses the scope of the lawyer's use of AI tools in the representation, and they might also consider obtaining the client's informed consent. Depending on the nature of the AI tools and how an attorney uses them, the attorney may want to have a conversation with the client about a specific application or use and obtain client consent.

While never mentioning Florida's version of ABA Model Rule 1.4, Florida Bar Ethics Opinion 24-1 glancingly addresses one aspect of these issues, noting that "[i]f the use of a generative AI program does not involve the disclosure of confidential information to a third-party, a lawyer is not required to obtain a client's informed consent pursuant to" Florida's version of Rule 1.6 on confidentiality.[23]

4. Fees (ABA Model Rule 1.5)

ABA Model Rule 1.5 regulates many aspects of attorney fees and expenses, beginning with the prohibition in Rule 1.5(a) on charging "an unreasonable fee or an unreasonable amount for expenses." Building on that prohibition,

most jurisdictions prohibit charging for expenses that are ordinarily accounted as overhead by the lawyer.[24]

Reviewing Florida and other law, Florida Bar Ethics Opinion 24-1 asserts that the ethics rules "require a lawyer to inform a client, preferably in writing, of the lawyer's intent to charge a client the actual cost of using generative AI" and that any charges for AI tools must be "reasonable and . . . not duplicative."[25] Further, "the lawyer should be careful not to charge for the time spent developing minimal competence in the use of generative AI."[26]

5. *Confidentiality (ABA Model Rule 1.6)*

ABA Model Rule 1.6 provides that attorneys may not disclose any "information relating to the representation of a client," unless the disclosure is impliedly authorized or the client consents to disclosure. Attorneys must use reasonable efforts to "prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[27] A client's confidential information may come from any source and may include information that is otherwise publicly available.[28] ABA Model Rule 1.9(c) establishes an attorney's duty to maintain the confidentiality of a former client's confidential information.

ABA Model Rule 1.6 requires attorneys to understand the operation and security of AI tools in order to avoid the unintended disclosure of confidential client information. For example, attorneys must understand that AI tools may gather information from users who interact with the application and developers may then use that information for other purposes, such as training the AI tool, targeted advertising, or responding to other users' requests. A prudent attorney should assume that any publicly available AI tools will retain and utilize user prompts, among other user inputs, along with a catalog of information about the user's interactions with the AI tool to benefit the provider. Accordingly, an attorney generally should not share confidential client information with any publicly available AI tools and must be careful to structure interactions with those AI tools to ensure client anonymity and continued confidentiality of client confidential information.

Of course, setting aside inadvertent disclosures, lawyers can and do sometimes consciously and intentionally disclose client confidential information in representing a client. They can do so under ABA Model Rule 1.6 with a client's informed consent or if the disclosure is impliedly

authorized. Florida Bar Ethics Opinion 24-1 suggests that, if using an AI tool does involve the disclosure of confidential information to a third party, a lawyer may well be required to obtain client consent.[29]

But not all use of AI tools will require disclosure of confidential information to a third party. Some attorneys and law firms may use custom-made or private proprietary AI tools separate from publicly available AI tools. Such private AI tools may alleviate some client confidentiality concerns that arise for public AI tools. Private AI tools may incorporate training on attorney or law firm database materials (perhaps including client confidential information of current or former clients) to provide valuable contextual insights that are unique to the users of the platform within the law firm.

The ABA Model Rules impose different restrictions on an attorney's use and disclosure of confidential client information—for example, "use" of client confidential information that is not to the disadvantage of the client is treated very differently under the ABA Model Rules than disclosure. The ABA Model Rules permit an attorney's use (without disclosure) of a current or former client's confidential information to the extent that the use is not to the disadvantage of the client.[30] In addition, even apart from confidential client information, an attorney may use legal knowledge and strategies learned in the representation of current or prior clients in similar matters in the representation of other or later clients, provided that such use occurs without disclosure or disadvantage to the current or former client. As to a former client, ABA Model Rule 1.9(c)(1) also permits the use of confidential client information to the extent that the information has become "generally known."[31]

Because of these restrictions, law firms and attorneys who utilize any confidential client information to train a private AI tool should consider the extent to which confidential information of current and former clients is accessible to the platform for training purposes, in light of the intended purpose and use of the AI tool. For example, if the output of the tool will *never* be shared with anyone outside the law firm, training on a wider set of client data might be possible, because the firm could simply prohibit any disclosure of the information outside the firm. In contrast, if the law firm intended to provide output to clients or others as part of its work product, it might be necessary because of confidentiality restrictions on client information (including, for example, ABA Model Rule 1.6, work product

protection, the attorney-client privilege, and protective orders) for the firm to evaluate all output before disclosure of that output in order to ensure compliance with confidentiality obligations. Additionally, attorneys and law firms whose clients impose specific use restrictions on their information must consider whether use of information concerning those clients' representations—whether for training an AI or other analytical purposes—may violate those restrictions.[32]

6. Duties to Prospective Clients (ABA Model Rule 1.18)

For more than 20 years, the ABA Model Rules have contained Rule 1.18, which addresses a lawyer's obligations to prospective clients—those people with whom a lawyer interacts but who do not ultimately become clients. While no model rule addresses whether and how an attorney-client relationship is established,[33] Model Rule 1.18 addresses a number of related issues.

Many lawyers today use chatbots for marketing or client intake purposes, including on their websites, and some of these chatbots are or can be driven by AI. Florida Bar Ethics Opinion 24-1, in recognition of these tools, raises several concerns.[34] The opinion warns that lawyers must take care in using AI-driven tools like chatbots for these functions in order to avoid the creation of an attorney-client relationship without the lawyer's knowledge. After all, under the law in Florida and elsewhere, an attorney-client relationship can sometimes be established based on the subjective reasonable belief of the client based on interactions with the lawyer—or, here, the lawyer's chatbot. The opinion also warns that "a lawyer should be wary of utilizing an overly welcoming generative AI chatbot that may provide legal advice, fail to immediately identify itself as a chatbot, or fail to include clear and reasonably understandable disclaimers limiting the lawyer's obligations."[35] This directive suggests that training a marketing or client-intake chatbot will likely become just as essential as training for human nonlawyer assistants.

7. Attorney as Advisor (ABA Model Rule 2.1)

As the sophistication and quality of AI tool work product improve, some attorneys may desire to forgo the time and effort of research, analysis, or

drafting in favor of using an AI tool's fast findings. ABA Model Rule 2.1 provides that an attorney must "exercise independent professional judgment and render candid advice." When advising a client, the attorney may rely on law and "other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." When a user enters a prompt into an AI tool requesting a letter, a summary of some written material, or other work product, the user's inclination may be to defer to a reasonably well-written response the application produces; it is, after all, right there and ready to go. Similarly, when a litigator reviews an analysis of venue options prepared by an AI tool, the temptation is to trust the program's data and conclusions; the AI tool may have considered more data than the litigator ever could. However, ABA Model Rule 2.1 reminds attorneys of their obligation not to take AI work product at face value. Even if an AI tool can instantaneously analyze the entirety of humanity's collective knowledge to prodigiously offer prescient predictions on a proven basis, an attorney simply cannot substitute the determinations of the AI tool for the attorney's independent, professional judgment, unless the lawyer has exercised their judgment to conclude that their reliance on the AI tool is well founded.

At times, ABA Model Rule 2.1 is cited as evidence that lawyers are not merely agents of their clients, as agency law does not require an agent to exercise independent, professional judgment.[36] ABA Model Rule 2.1 requires independence "in order to increase the prospects that the attorney's advice will be accurate. Uninformed advice is unlikely to be accurate."[37] Similarly, assuming that the output of an AI tool will be accurate, appropriate, or helpful to the client without careful review decreases the likelihood that the lawyer's counsel or work product will be accurate, appropriate, or helpful to the client. Even when the AI tool's analysis or text is accurate and appropriate—such as a venue analysis that identifies the judge who has issued opinions in similar disputes most favorable to the client—there might be other considerations that favor different recommendations that the attorney should discuss with the client. Those considerations could include sources of information unavailable to an AI tool, such as the personal experience of the lawyer or their partners or, as the rule suggests, moral, economic, social, and political factors.

Even when a lawyer has ample experience with an AI tool and has noted that they have always agreed with the AI tool's conclusions, counsel is still required under ABA Model Rule 2.1 to exercise their professional judgment

and must review the AI tool's conclusions prior to relying on them when presenting advice to the client. Such conclusions can inform client recommendations, but a lawyer's advice should be informed by all relevant factors.[38]

The Wisconsin Supreme Court reached a similar conclusion when it considered the extent to which state circuit courts could rely on risk assessment reports prepared by COMPAS, an AI tool that creates reports evaluating the likelihood a defendant will be a repeat offender. The court accepted the use of such reports, provided they are not determinative in incarcerating a defendant or in the severity of a sentence but are one of many factors circuit courts rely on in sentencing: "[C]onsideration of a [report prepared by an AI tool] at sentencing along with other supporting factors is helpful in providing the sentencing court with as much information as possible in order to arrive at an individualized sentence."[39]

8. Candor toward the Tribunal (ABA Model Rule 3.3)

Lawyers cannot misstate facts or law to a tribunal, and special attention should be given to research and documents prepared by generative AI tools that may be submitted to courts. ABA Model Rule 3.3 prohibits a lawyer from making "a false statement of fact or law to a tribunal or fail[ing] to correct a false statement of material fact or law previously made to the tribunal by the lawyer." The *Mata v. Avianca* case stands in part for the principle that an attorney may be held responsible for erroneous law cited or created by an AI program the lawyer presents to a court.[40] The judge in *Mata* specifically cited ABA Model Rule 3.3, noting a "lawyer may make a false statement of law where he 'liberally us[ed] ellipses' in order to 'change' or 'misrepresent' a court's holding."[41] Under ABA Model Rule 3.3, lawyers are obligated to review all AI-generated research and documents before submitting them to the court, just as they are required to do so with research and documents prepared by any other human or tool.[42]

9. Supervision (ABA Model Rules 5.1 and 5.3)

Attorneys have clear obligations under the ABA Model Rules to supervise lawyers and other staff with whom they work.[43] ABA Model Rule 5.1 provides that any "lawyer having direct supervisory authority over another

lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." Similarly, ABA Model Rule 5.3 requires that a lawyer who is supervising other staff "make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

Of course, an AI tool is not a lawyer or a staff member, but when a lawyer or staff member is relying on AI to perform tasks that are similar to those performed by attorneys or staff members (e.g., preparing first drafts, analyzing documents), the supervising lawyer must oversee their use of AI. ABA Model Rule 5.1 does not provide for vicarious disciplinary liability of a supervising lawyer, unless the supervising lawyer directs or ratifies the disciplinary violation. But a supervisory lawyer may be disciplined under ABA Model Rule 5.1(b) if they have not "[made] reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct"—for example, if the lawyer charged is responsible for training the other lawyer and has not provided adequate training.[44] Thus a supervising lawyer has an obligation under the rule for the supervision of lawyers working for the supervisor who are using AI tools, probably including ensuring that the supervised lawyer is appropriately trained and aware of their obligations of competence and diligence discussed earlier. Similarly, a lawyer who incorporates AI into their practice must properly review and oversee how other staff members use it.

Arguably, one of the lessons from *Mata* is that lawyers will be held responsible for mistakes an AI tool makes in work they adopt as their own. Although in *Mata* that was because the lawyer signed a submission to the court confirming the document accurately reflected the law when it did not, a supervising lawyer might well similarly be found to have violated ABA Model Rule 5.1 if they rely on research a junior associate generated using an AI tool if that research turns out to be a hallucination that negatively impacts the client and if the supervising lawyer is found to have failed to make "reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct."

Florida Bar Ethics Opinion 24-1 treats in some depth the application of Florida's version of Rule 5.3 to a lawyer's use of AI tools. The opinion notes both the lawyer's obligation to oversee an AI tool and the potential consequences for failure to do so:

> [A] lawyer must review the work product of a generative AI in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals. Lawyers are ultimately responsible for the work product that they create regardless of whether that work product was originally drafted or researched by a nonlawyer or generative AI.
>
> Functionally, this means a lawyer must verify the accuracy and sufficiency of all research performed by generative AI. The failure to do so can lead to violations of the lawyer's duties of competence (Rule 4-1.1), avoidance of frivolous claims and contentions (Rule 4-3.1), candor to the tribunal (Rule 4-3.3), and truthfulness to others (Rule 4-4.1), in addition to sanctions that may be imposed by a tribunal against the lawyer and the lawyer's client.[45]

Note especially the nuance the opinion draws between the requirement that the lawyer "review the work product of a generative AI *in situations similar to those requiring review of the work of nonlawyer assistants such as paralegals*" (emphasis added), but not necessarily in all situations, and the requirement that "a lawyer must verify the accuracy and sufficiency of all research performed by generative AI." [46] Only time and experience will tell how long this nuance survives in an age of increasing AI use.

10. Unauthorized Practice of Law (ABA Model Rule 5.5)

ABA Model Rule 5.5 bars lawyers from engaging in the unauthorized practice of law (UPL) or assisting another person in engaging in UPL. While lawyer use of AI tools in the course of providing legal services should never amount to UPL—after all, the lawyer is *authorized* to practice law—it is conceivable that a lawyer might somehow assist someone who is not licensed to practice in using or providing legal services through an AI tool without any lawyer oversight or supervision.[47]

11. Advertising (ABA Model Rules 7.1 and 7.2)

While the provisions of the ABA Model Rules governing lawyer advertising were revised and streamlined in 2018, U.S. jurisdictions continue to have quite divergent advertising rules in place. Nevertheless, every U.S.

jurisdiction retains in some form the prohibition of ABA Model Rule 7.1 barring any "false or misleading communication about the lawyer or the lawyer's services."

Florida Bar Ethics Opinion 24-1, relying on a similar prohibition and a more specific prohibition on lawyers creating in marketing efforts "the erroneous impression that the person speaking or shown is the advertising lawyer" or their employee, warns lawyers against the misleading use of AI tools, such as AI-driven chatbots.[48] The opinion provides that disclosure of the use of a chatbot (as opposed to a human being) is required.[49] Further, the opinion warns against any misleading claims being made by AI tools or claims that the lawyer's "generative AI is superior to those used by other lawyers or law firms unless the lawyer's claims are objectively verifiable."[50]

III. Best Practices and Conclusions

As of this writing, few decisions or ethics opinions directly address the ethical obligations applicable to an attorney's use of AI tools in client representation. Nonetheless, despite a dearth of materials directly on point, we can discern the broad strokes of practical guidelines to inform how attorneys may ethically use emerging AI tools in practice:

- An attorney must understand the basics of any AI tool they use. That does not mean that an attorney must read the software's code or understand the algorithmic science of how an AI tool produces results, but they must understand the AI tool's intended purpose, the ways in which the attorney may effectively use the AI tool, and the quality and accuracy of the work or results it can and should produce. An attorney should also know enough about the AI tool's development, operation, and use, as well as the experience of other users, to reasonably evaluate the reliability and safety of the AI tool for its intended purposes.
- Generally, an attorney should not input confidential client information into a publicly available AI tool. If an attorney must supply confidential client information to an AI tool in order to use the AI tool for its intended purposes, they must understand how the AI tool

handles such confidential information, including what information or data the AI tool retains or shares with others; where such information is stored and for how long; how such information is used; who has access to the information; and whether the information will remain protected or may later be disclosed by the application in any way. To the extent that confidential client information must be supplied to an AI tool, a lawyer should consider whether informed consent from the client is necessary and must make reasonable efforts to protect the confidentiality of such information.

- A reasonable attorney will prudently and appropriately review all of an AI tool's work product for accuracy and applicability prior to the use of such work product, including presentation or submission of such work product or its derivatives to the client, court, or any outside party. Likewise, an attorney should consider whether any facts or legal analysis generated by an AI tool should be independently verified.
- At present, perhaps the greatest uncertainty in a lawyer's ethical obligations concerning the use of AI tools is the extent to which a lawyer should or must obtain client consent or perhaps simply inform a client (such as in an engagement letter) when the lawyer is using an AI tool.[51] Virtually no guidance outside the rules exists.[52] That said, there are surely some circumstances where the use of some current AI tools no more requires client consent than a lawyer's decision to use a law book or Westlaw or Lexis to find a case. At the same time, the use of an AI tool to evaluate the substantive terms of hundreds of vendor contracts critical to the valuation of a company to be acquired by a client might well be a proper subject for discussion with a client. As with any other question of informed consent under the ethics rules, many factors may determine whether informed consent is needed and the nature of that informed consent, including, for example, the experience, sophistication, and goals of the client.
- An attorney should provide confidential client information to an AI tool maintained by a third party with great caution and only after ensuring the information will be maintained as confidential, will be protected by appropriate privacy and security measures, and will not

be accessible to train the third party's AI tool for use beyond the attorney or the attorney's firm.

- An attorney should incorporate AI into their advertising and potential client communications with great caution. Marketing should not suggest that an attorney's AI tools are superior to those of other attorneys unless there is evidence to support that claim. Any chatbot or similar AI tools used to communicate with potential clients should likely note that they are automated tools and should be monitored carefully to ensure they do not give the impression that a potential client's interactions with the tool have created an attorney-client relationship.
- Any fees an attorney charges to clients for AI tools must be reasonable and nonduplicative. The attorney should ensure that clients understand how, and the extent to which, the fees include the attorney's use of AI.

AI tools are transformative technologies that herald the onset of a transitional period in the practice of law. AI tools promise an increase in productivity, capacity, and capability, and the adoption of AI tools may become ubiquitous in law and business operations. As AI tools proliferate throughout the practice of law, specific ethical guidelines will quickly emerge to refine the framework of the broad principles and practices set forth earlier. Attorneys will need to continue to stay abreast of these developments.

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1. The opinion is available at https://www-media.floridabar.org/uploads/2024/01/FL-Bar-Ethics-Op-24-1.pdf. Two judicial ethics opinions have been issued. *See* W. Va. Jud. Investigation Comm'n Advisory Op. 2023-22 (Oct. 13, 2023), https://www.courtswv.gov/sites/default/pubfilesmnt/2023-11/JIC%20Advisory%20Opinion%202023-22_Redacted.pdf; State Bar of Mich. Judicial Ethics Op. JI-155 (July 7, 2023), https://www.michbar.org/opinions/ethics/numbered_opinions/JI-155#.

2. *See, e.g.*, Park v. Kim, No. 22-2057, 2024 WL 332478, at *4 (2d Cir. Jan. 30, 2024) (referring plaintiff-appellant's attorney for possible disciplinary action based upon his submission of reply brief that contained "non-existent authority" generated by ChatGPT); United States v. Cohen, 2023 WL 8635521, at *1 (S.D.N.Y. Dec. 12, 2023) (ordering defense counsel to "show cause in writing why he should not be sanctioned . . . for citing non-existent cases to the Court"); Will of Samuel, 2024 WL 238160, at *2 (N.Y. Sur. Jan. 11, 2024) (announcing court's intention to sanction moving party's attorney for submitting reply papers containing "fictional and/or erroneous citations as a result of his reliance on a website which contained information created by Generative Artificial Intelligence").

3. No. 22-CV-1461 (PKC), 2023 WL 4114965 (S.D.N.Y. June 22, 2023).

4. *See* 2 RONALD E. MALLEN, LEGAL MALPRACTICE §§ 20:1–:16 (2023).

5. *Id*. § 20:2 (citing case, citation omitted).

6. 60 F.2d 737 (2d Cir. 1932) (Hand, J.).

7. There has been one reported instance of a convicted criminal defendant seeking a new trial on the basis of alleged ineffective assistance of counsel, where the defendant alleged that his lawyer incompetently used an AI tool to help craft his closing argument. *See* Josh Gerstein, *Pras Michel of Fugees Seeks New Trial, Contends Former Attorney Used AI for Closing Argument*, POLITICO (Oct. 16, 2023), https://www.politico.com/news/2023/10/16/pras-michel-fugees-trial-ai-closing-argument-00121900.

8. *See* MALLEN, *supra* note 4, §§ 15:1–:31.

9. *See id.*, chs. 9–11 (discussing various bases for statutory liability).

10. No. 22-CV-1461 (PKC), 2023 WL 4114965 (S.D.N.Y. June 22, 2023).

11. The first to do so was Judge Brantley Starr of the U.S. District Court for the Northern District of Texas, whose order requires attorneys and pro se litigants to file a "certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence . . . or that any language drafted by generative artificial intelligence will be checked for accuracy." Judge Brantley Starr, Mandatory Certification Regarding Generative Artificial Intelligence (N.D. Tex. May 30, 2023), https://www.txnd.uscourts.gov/judge/judge-brantley-starr. A few other judges have followed, but care should be given to the specific text of each order, as some apply only to generative AI tools and others apply to AI tools more broadly. For example, Judge Michael M. Baylson of the U.S. District Court for the Eastern District of Pennsylvania ordered the disclosure of any use of artificial intelligence that "has been used in any way in the . . . filing." Standing Order re: Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson (E.D. Pa. June 6, 2023), https://www.paed.uscourts.gov/sites/paed/files/documents/locrules/standord/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf. Many applications commonly used by attorneys include AI functionalities, including Google, Westlaw, and Microsoft Word. Orders such as Judge Baylson's might be broad enough to require disclosure of the use of those applications. The U.S. Court of Appeals for the Fifth Circuit is considering a similar rule addressing generative AI tools. *See* Notice of Proposed Amendment to 5th Cir. R. 32.3 (Nov. 21, 2023), https://www.ca5.uscourts.gov//docs/default-source/default-document-library/public-comment-local-rule-32-3-and-form-6. For a more thorough discussion of judges' orders governing the disclosure of AI use, see Maura R. Grossman, Paul W. Grimm & Daniel G. Brown, *Is Disclosure and Certification of the Use of Generative AI Really Necessary?*, 107(2) JUDICATURE 69 (2023), https://judicature.duke.edu/articles/is-disclosure-and-certification-of-the-use-of-generative-ai-really-necessary/.

12. The ABA maintains a set of documents that analyze the extent to which the 51 U.S. jurisdictions' versions of individual rules vary from each of the ABA Model Rules. *See* Am. Bar Ass'n Ctr. for Prof. Resp., *Jurisdictional Rules Comparison Charts*, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ (last visited Mar. 13, 2024).

13. *See* Am. Bar Ass'n Ctr. for Prof. Resp., *Rule 1.1, Comment [8] Technological Competence* (Apr. 4, 2023), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc1-1-comment-8.pdf (counting 39, but noting Louisiana ethics opinion); Robert J. Ambrogi, *Tech Competence: 40 States Have Adopted the Duty of Technology Competence,* LAWSITES, https://www.lawnext.com/tech-competence (last visited Mar. 13, 2024) (including Louisiana ethics opinion in count).

14. *See, e.g.*, ABA Formal Op. 477R, Securing Communication of Protected Client Information (May 19, 2017).

15. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 2.

16. *Id*.

17. *See* State Bar of Cal. Standing Comm. on Pro. Resp. & Conduct, Practical Guidance for the Use of Generative Artificial Intelligence in the Practice of Law (Nov. 16, 2023), https://www.calbar.ca.gov/Portals/0/documents/ethics/Generative-AI-Practical-Guidance.pdf [hereinafter Cal. Practical Guidance].

18. *See id.*

19. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 3.

20. ABA Model Rule 1.4 Comment [1] provides: "Reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation."

21. Julia Brickell et al., *AI, Pursuit of Justice & Questions Lawyers Should Ask*, BLOOMBERG L. (Apr. 2022), https://www.bloomberglaw.com/external/document/X3T91GR8000000/tech-telecom-professional-perspective-ai-pursuit-of-justice-ques.

22. Rafael Baca, *Model Ethics Rules as Applied to Artificial Intelligence*, LAW PRAC. TODAY (Aug. 14, 2020), https://www.lawpracticetoday.org/article/model-ethics-rules-as-applied-to-artificial-intelligence/.

23. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 3–4.

24. *See, e.g.*, ABA Formal Op. 93-379, Billing for Professional Fees, Disbursements and Other Expenses (Dec. 6, 1993) (lawyer should charge clients only for costs that reasonably reflect the lawyer's actual costs).

25. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 6.

26. *Id*.

27. Forty-six jurisdictions adhere to the broad language of Model Rule 1.6. Alaska; Washington, DC; Maine; Michigan; and Virginia retain rules consistent with the ABA's Model Code of Professional Responsibility that require lawyers to protect a narrower set of "client confidences" (information protected by the attorney-client privilege) and "secrets" (information kept private per client request or information that could embarrass or harm the client upon disclosure).

28. Neither Model Rule 1.6 nor Model Code DR 4-101 excepts information that is publicly available. *See* ABA Formal Op. 479 (Dec. 15, 2017).

29. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 3–4 ("If the use of a generative AI program does not involve the disclosure of confidential information to a third-party, a lawyer is not required to obtain a client's informed consent pursuant to" Florida's version of Rule 1.6 on confidentiality, thus implying that consent may otherwise be required).

30. See Model Rule 1.8(b) with respect to current clients and ABA Model Rule 1.9(c) with respect to former clients. Some jurisdictions also regulate attorneys' use of confidential client information even if there is no harm to the client. For example, Massachusetts prohibits attorneys from using confidential client information for their own or another's benefit.

31. ABA Formal Opinion 479, The "Generally Known" Exception to Former-Client Confidentiality (Dec. 15, 2017), clarifies that this "generally known" exception "applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade" and that such information is not "generally known" due to court records or discussion in court proceedings.

32. As discussed earlier, corporate clients and clients in heavily regulated industries have increasingly imposed on lawyers outside counsel guidelines. These frequently include provisions concerning confidentiality and use of the client's information. Of course, those concerning confidentiality

clearly implicate the use of some AI tools. Less well understood or recognized, however, is the fact that some outside counsel guideline provisions that ban the use of client information for *any* purpose other than the client's representation could, in theory, prevent the lawyer from using information about that client's matter in, for example, training an AI tool or performing broader analysis with an AI tool, whether for the firm's benefit or other firm clients' benefit, even if the information remains completely and effectively anonymized. Lawyers might consider using better or different engagement terms, or refusing to agree to sweeping no-use outside counsel guideline terms, to preserve their ability to use client confidential information in ways consistent with ABA Model Rules 1.6 and 1.9(c).

33. For the common law on how an attorney-client relationship is established, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (AM. L. INST. 2000).

34. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 5.

35. *Id.*

36. Kevin H. Michels, *Lawyer Independence: From Ideal to Viable Legal Standard*, 61 CASE W. RES. L. REV. 85, 96 (2010); *see generally* RESTATEMENT (THIRD) OF AGENCY (AM. L. INST. 2006).

37. Michels, *supra* note 36, at 116.

38. Without pointing to any particular ethics rule, Florida Bar Ethics Opinion 24-1, *supra* note 1, at 5, also cautions a lawyer against allowing a client to rely solely on the output of AI tools, without appropriate cautions to the client about its source and reliability. The opinion notes that, "[j]ust as with nonlawyer staff, a lawyer should not instruct or encourage a client to rely solely on the 'work product' of generative AI, such as due diligence reports, without the lawyer's own personal review of that work product." Even where a client knows, or even requests, the use of AI tools, it may well be incumbent on a lawyer to advise the client concerning the limits and risks of those AI tools.

39. Wisconsin v. Loomis, 371 Wis. 2d 235, 266 (2016).

40. As noted earlier, in the wake of *Mata v. Avianca*, several jurisdictions have produced standing orders including unequivocal statements that a responsible attorney will be held accountable for erroneous citations or manufactured jurisprudence made by an AI tool in court submissions.

41. Mata v. Avianca, No. 22-CV-1461 (PKC), 2023 WL 4114965, at *12 (S.D.N.Y. June 22, 2023) (citations omitted).

42. *See* Cal. Practical Guidance, *supra* note 17, at 5.

43. Douglas R. Richmond, *Watching Over, Watching Out: Lawyers' Responsibilities for Non-lawyer Assistants*, 61 U. KAN. L. REV. 441, 443 (2012) (noting that ABA Model Rules 5.1 and 5.3 "establish a comprehensive, flexible supervisory regime").

44. *Id.* at 447–48; Douglas R. Richmond, *Law Firm Partners as Their Brothers' Keepers*, 96 KY. L.J. 231, 240–41 (2007); *see In re* Wilkinson, 805 So. 2d 142 (2002) (upholding attorney suspension for failure to properly supervise another attorney and a nonlawyer clerk in violation of ABA Model Rules 5.1(b) and 5.3).

45. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 4–5.

46. *Id.*

47. At least one company has tried offering an AI tool that would assist pro se litigants during a court hearing, although the AI tool was arguably only a marketing stunt, and the company ceased that effort amidst allegations of UPL. It is worth considering whether a properly produced and governed AI tool that could improve access to justice might be carved out from UPL prohibitions.

48. Fla. Bar Ethics Op. 24-1, *supra* note 1, at 7.

49. *Id.*

50. *Id.*

51. An attorney's ethical obligations under the ABA Model Rules are different, of course, than practical, client-specific considerations regarding disclosure and confirmation of AI tools. Even though an attorney may not be ethically obligated to disclose use of AI tools or to obtain client consent before using a particular AI tool, they may opt to pursue consent or disclosure based on their own opinion of AI and/or their relationship with clients.

52. Some exceptions exist. *See* Cal. Practical Guidance, *supra* note 17, at 4:

> A lawyer should evaluate their communication obligations throughout the representation based on the facts and circumstances, including the novelty of the technology, risks associated with generative AI use, scope of the representation, and sophistication of the client.
>
> The lawyer 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.
>
> A lawyer should review any applicable client instructions or guidelines that may restrict or limit the use of generative AI.