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NEW GOVERNANCE AND NEW TECHNOLOGIES: CREATING A REGULATORY REGIME FOR THE USE OF GENERATIVE ARTIFICIAL INTELLIGENCE IN THE COURTS

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The wide availability of generative artificial intelligence ("GenAI") led at least some to predict the rapid demise of many different professions, including the legal profession. But even as developers introduce newer versions of this technology, and as its use has become more widespread, reports of the demise of these professions—most notably, for this Article's purposes, the legal profession—have been greatly exaggerated. Highly publicized instances of the technology functioning poorly have resulted in pleadings and other legal filings containing fictitious cases and legal authorities. Courts have sanctioned both lawyers and pro se *litigants who have relied upon what has come to be known as GenAI's hallucinatory outputs in their filings before such courts. But at least some courts have determined that it is insufficient to rely on* ex post *sanctions alone to punish those who might improperly rely on the outputs of GenAI. Indeed, some individual judges as well as judicial systems have found it appropriate to issue standing orders and local rules that serve as* ex ante *methods designed to prevent the improper use of GenAI tools; these orders serve as complements to the mechanisms available to judges to sanction litigant misconduct after the fact. This Article is the first to describe these* ex ante *rules and compare the different* ex ante *approaches to the* ex post *mechanisms already available to judges who wish to prevent, punish, and rein in conduct infected by GenAI hallucinations. In addition to providing an analysis of these judicially created* ex ante *rules—which are departures from more established methods that historically enable judges to punish improper litigant conduct—this Article will situate the development of these* ex ante *rules within the field of scholarship addressing regulatory matters often referred to as New Governance Theory. While certainly providing guidance to and oversight of litigants utilizing GenAI, these innovative, decentralized, and experimental judicial approaches also exhibit many of the features of New Governance methodologies. Furthermore, as GenAI*

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continues to play a larger role in the legal profession generally and in litigation particularly, these New Governance approaches may help usher in an era of effective, efficient, and ethical uses of GenAI in litigation—and also provide a roadmap for its effective, safe, and lawful use in other areas as well.

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I. INTRODUCTION

In late November 2022, the introduction of a relatively advanced version of a generative artificial intelligence product, ChatGPT 3.0,[1] led some to predict the rapid demise of many different professions, from journalism[2] and computer programming,[3] to art[4] and law.[5] Roughly two years have elapsed since that potentially disruptive moment in the history of many professions—and, if the technology's

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[1] On the introduction of ChatGPT 3.0, see generally Bernard Marr, *A Short History of ChatGPT: How We Got to Where We Are Today*, FORBES (May 19, 2023, 1:14 AM), https://www.forbes.com/sites/bernardmarr/2023/05/19/a-short-history-of-chatgpt-how-we-got-to-where-we-are-today/ [https://perma.cc/HJV3-Q2M7].

[2] For an argument that GenAI will negatively impact journalism, see generally Caitlin Chin, *Navigating the Risks of Artificial Intelligence on the Digital News Landscape*, CTR. STRATEGIC & INT'L STUD. (Aug. 31, 2023), https://www.csis.org/analysis/navigating-risks-artificial-intelligence-digital-news-landscape [https://perma.cc/7HW4-YZ3S].

[3] On the impact of GenAI on computer programming, see generally Begum Karaci Deniz et al., *Unleashing Developer Productivity with Generative AI*, MCKINSEY DIGITAL (June 27, 2023), https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/unleashing-developer-productivity-with-generative-ai#/ [https://perma.cc/DS22-C7DH].

[4] For an analysis of potential implications of GenAI for the production of art, see generally Elze Sigute Mikalonyte & Markus Kneer, *Can Artificial Intelligence Make Art? Folk Intuitions as to Whether AI-driven Robots Can Be Viewed as Artists and Produce Art*, 11 ACM TRANSACTIONS ON HUMAN-ROBOT INTERACTION 43:1 (2022).

[5] For an analysis of the potential impact of GenAI on the legal profession, see generally THOMSON REUTERS, FUTURE OF PROFESSIONALS REPORT (July 2024), https://www.thomsonreuters.com/content/dam/ewp-m/documents/thomsonreuters/en/pdf/reports/future-of-professionals-report-2024.pdf [https://perma.cc/9E5G-RD62].

main evangelists are to be believed, the history of the human race itself.[6] But even as developers introduce newer versions of this technology, and as its use has become more widespread, to paraphrase Samuel Clemens: The reports of the demise of the professions, including the legal profession, have been greatly exaggerated.[7]

While computer applications using generative artificial intelligence ("GenAI") have certainly entered law practice in several ways,[8] much of the attention to date has focused on highly publicized instances of the technology functioning poorly that resulted in pleadings and other legal filings containing fictitious cases and legal authorities.[9] In these instances, the technology has, in common parlance, "hallucinated."[10] Courts have sanctioned both lawyers and *pro se* litigants who have relied upon GenAI's hallucinatory outputs in their filings.[11] But at least some courts have determined that *ex post* sanctions (whether through Rule 11 of the Federal Rules of Civil Procedure[12] or the courts' inherent powers[13]) punishing those who rely on the outputs of GenAI are not sufficient to ensure those outputs are legitimate legal authorities.[14]

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[6] For arguments that GenAI represents a potential significant leap forward in the history of the human race, see generally Nick Bilton, *Artificial Intelligence May Be Humanity's Most Ingenious Invention—And Its Last?*, VANITY FAIR (Sept. 13, 2023), https://www.vanityfair.com/news/2023/09/artificial-intelligence-industry-future [https://perma.cc/9E5G-RD62].

[7] Cable from Samuel Clemens to the Associated Press, *quoted in* 2 ALBERT BIGELOW PAINE, MARK TWAIN: A BIOGRAPHY 1039 (1912). This quote is itself somewhat exaggerated. Laura I. Appleman, *Reports of Batson's Death Have Been Greatly Exaggerated: How the Batson Doctrine Enforces a Normative Framework of Legal Ethics*, 78 TEMPLE L. REV. 607, 607 n.1 (2005) (describing provenance of this quote and that it is actually a misquote).

[8] For a description of some of the ways in which GenAI has begun to impact the practice of law, see BL, *How Is AI Changing the Legal Profession?* (May 23, 2024), https://pro.bloomberg//law.com/insights/technology/how-is-ai-changing-the-legal-profession [https://perma.cc/43ZH-6DWU].

[9] *See infra* Part I.C.

[10] On GenAI's hallucinations, see GOOGLE, *What Are AI Hallucinations*, https://cloud.google.com/discover/what-are-ai-hallucinations# [https://perma.cc/M662-GE75] (last accessed July 28, 2024).

[11] *See infra* Part I.B.

[12] Fed. R. Civ. P. 11.

[13] Chambers v. Nasco, Inc., 501 U.S. 32, 43–46 (1991) (describing inherent powers of courts, which includes, inter alia, the power to punish litigants for bad faith conduct).

[14] *See infra* Part I.B.

Rather, some individual judges as well as judicial bodies have found it appropriate to issue standing orders and local rules that serve as *ex ante* methods for preventing the improper use of GenAI tools.[15] These orders complement other tools judges have for sanctioning litigant misconduct after the fact. This Article is the first to identify these *ex ante* rules and compare them to *ex post* mechanisms already available to judges who wish to rein in hallucination-infected conduct and deter litigants from abusing GenAI tools.

In addition to providing an analysis of these judicially created *ex ante* rules—which represent a departure from more established methods that historically have enabled judges to punish improper litigant conduct—this Article also situates the emergence of these *ex ante* rules within the field of scholarship addressing regulatory matters often referred to as New Governance. These innovative, distributed, and diffused judicial approaches to discouraging and preventing GenAI abuse exhibit many features of New Governance methodologies. Furthermore, as GenAI continues to play a larger role in the legal profession in general and litigation in particular, these New Governance approaches can help usher in an era of effective, efficient, and ethical uses of GenAI in litigation. They can also provide a roadmap for the effective, safe, and lawful use of GenAI in other areas.

In order to address these issues, this Article proceeds as follows. Part II describes GenAI's introduction into the world generally—with a particular focus on the legal profession. Part II also explains the problem of GenAI hallucinations and describes the instances to date in which courts have punished the improper reliance on GenAI in legal filings. This discussion focuses on how courts use existing tools—which consist exclusively of *ex post* mechanisms—for punishing improper conduct after the fact. This Part also describes the risks that the improper use of GenAI poses to courts, litigants, and the legal system. Part III then provides a typology of the different *ex ante* rules that some individual judges and discrete court systems have put in place to prevent such improper use. It also shows that these approaches are consistent with New Governance Theory. Finally, Part IV offers recommendations for the ways in which these and other New Governance approaches might prove valuable in other areas outside

[15] *See infra* Part II.C.

of the litigation context, where improper reliance on GenAI poses risks.

II. THE INTRODUCTION OF GENAI IN THE PRACTICE OF LAW AND THE JUDICIAL SYSTEM

A. The Emergence of GenAI

The introduction of a new form of artificial intelligence—GenAI—in November 2022 had some calling this new technology a "game-changer" for many industries, including the legal profession.[16] The use of search functions in internet-based and other forms of digital research, driven by better and more focused algorithms since the mid-1990s, is not new.[17] However, such search algorithms typically produced mere hyperlinks that a researcher then had to click on and explore, requiring some degree of analysis, assessment, and synthesis of the information generated by the search.[18] What GenAI does is different: When prompted through a query, one that is more pointed and focused than a typical internet search, this new form of artificial intelligence generates text that is supposed to—in theory—answer the query posed after searching what are known as large language models ("LLMs").[19] GenAI uses a technique sometimes referred to as predictive text, or probabilistic models.[20] By scanning massive amounts of information in an instant, it develops answers to the queries posed

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[16] Owen Morris, *The Transformative Power of Generative AI in the Legal Field*, AM. BAR ASS'N, LAW TECH. TODAY (Sept. 12, 2023), https://www.americanbar.org/groups/law_practice/resources/law-technology-today/2023/the-transformative-power-of-generative-ai-in-the-legal-field/ [https://perma.cc/HU2J-MNBH (staff-uploaded)] (describing generative AI as a "game-changer for the global workforce," including the legal industry).

[17] Eric T. Bradlow & David C. Schmittlein. The Little Engines that Could: Modeling the Performance of World Wide Web Search Engines, 19 MKTG. SCI. 43, 44 (2000).

[18] *See* WEBWISE.IE, *Digital Literacy Skills: Finding Information*, https://www.webwise.ie/teachers/advice-teachers/digital-literacy-skills-finding-information/ [https://perma.cc/4XQE-MM9X] (last visited, July 28, 2024).

[19] Cole Stryker & Mark Scapicchio, *What is Generative AI?*, IBM (Mar. 22, 2024), https://www.ibm.com/topics/generative-ai [https://perma.cc/H79K-EVN7].

[20] Patrick Breen, *Generative AI and What It Means for You*, LEXISNEXIS (May 14, 2023), https://www.lexisnexis.com/blogs/hk-legal/b/thought-leadership/posts/generative-ai-and-what-it-means-to-you [https://perma.cc/5G6B-FZCC].

by predicting what text will typically come next.[21] GenAI then uses this information to generate the answer in a plain-language format.[22] It can also provide the individual creating the prompt with sources for the text and answers generated.[23] The uses of this innovative technology are, at least according to its creators and evangelists, "practically boundless."[24] It certainly can be used to generate new content, summarize large quantities of existing data, and improve or even write computer code.[25] Many predicted—and still predict—that this technology will likely disrupt entire industries and professions, including journalism, computer coding, and the legal profession.[26] The next Section describes some of the potential uses of GenAI in the practice of law.

B. GenAI and the Practice of Law

In late December 2022, Andrew Perlman, dean of Suffolk Law School, posted a paper on the Social Science Research Network that described the newest version of GenAI, ChatGPT-3, as "a state-of-the-art chatbot developed by OpenAI."[27] He argued that this

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[21] Thimothy B. Lee & Sean Trott, *A Jargon-Free Explanation of How AI Large Language Models Work*, ARS TECHNICA (July 31, 2023, 7:00 AM), https://arstechnica.com/science/2023/07/a-jargon-free-explanation-of-how-ai-large-language-models-work/ [https://perma.cc/GU8W-HHRK].

[22] Mikhail Burtsev et al., *The Working Limitations of Large Language Models*, MIT SLOAN MGMT. REV. (Winter 2024), https://sloanreview.mit.edu/article/the-working-limitations-of-large-language-models/ [https://perma.cc/CG33-GNTG].

[23] David Gewirtz, *How to Make ChatGPT Provide Sources and Citations,* ZDNET (June 28, 2024, 3:07 AM), https://www.zdnet.com/article/how-to-make-chatgpt-provide-sources-and-citations/ [https://perma.cc/5YKK-JDQR].

[24] Paul Ricard et al., *Keeping Up with Generative AI*, OLIVER WYMAN, https://www.oliverwyman.com/our-expertise/insights/2023/aug/how-insurers-can-successfully-use-generative-artificial-intelligence.html [https://perma.cc/WW9J-963N] (last visited, July 30, 2024).

[25] Tim Mucci, *Generative AI Use Cases for the Enterprise*, IBM (Feb. 13, 2024), https://www.ibm.com/blog/generative-ai-use-cases/ [https://perma.cc/KCC3-ME7P].

[26] Bethany Cianciolo & Jessica Chia, Opinion, *Here Are the Jobs AI Will Impact the Most*, CNN (Sept. 5, 2023, 10:09 AM), https://www.cnn.com/2023/09/05/opinions/artificial-intelligence-jobs-labor-market/index.html [https://perma.cc/DSA9-LNC6].

[27] Andrew Perlman, *The Implications of ChatGPT for Legal Services and Society,* Suffolk University Law School Research Paper No. 22-14 1 (Rev. Feb. 29, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4294197 [https://perma.cc/FZ6A-T7UT].

technology "has the potential to revolutionize the way legal work is done, from legal research and document generation to providing general legal information to the public."[28] Though the article was posted by Perlman, he produced the paper largely by posing questions to the chatbot. The technology itself, when prompted, described its potential use cases in the legal profession as "[l]egal research," "[d]ocument generation," "[p]roviding general legal information," and "[l]egal analysis."[29] Since Perlman released his paper, many have explored ways to use GenAI to make the work of lawyers more efficient and effective, including in analyzing precedent, synthesizing data, managing lawyer workflows, engaging in predictive analytics, drafting documents and contracts, and summarizing research.[30] Because this technology could provide useful guidance and information to the unrepresented, some hailed the introduction of GenAI as having the potential to close the justice gap by serving those generally underserved by the legal profession.[31]

As John Villasenor recently explained, GenAI is likely to have a more significant impact on the practice of law than other technologies.[32] While many technologies have been introduced into the practice of law over the last few decades, those technologies "were designed to help attorneys efficiently find information that they could then use in formulating and supporting arguments."[33] In contrast, GenAI "can directly contribute to the process of articulating arguments."[34] As a result, according to Villasenor, this technology

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[28] *Id.* at 1–2.

[29] *Id.* at 2–3.

[30] A newly released American Bar Association publication provides an analysis of the role that artificial intelligence will play in the practice of law. *See generally* ARTIFICIAL INTELLIGENCE: LEGAL ISSUES, POLICY, AND PRACTICAL STRATEGIES (Cynthia H. Cwik et al. eds., 2024) [hereinafter AI LEGAL ISSUES].

[31] For an overview of the role that GenAI can potentially play in improving access to justice, see Ray Brescia & James Sandman, *Artificial Intelligence and Access to Justice: A Potential Game Changer in Closing the Justice Gap*, *in* AI LEGAL ISSUES., *supra* note 30, at 187–200.

[32] John Villasenor, *Generative Artificial Intelligence and the Practice of Law: Impact, Opportunities and Risks*, 25 MINN. J. OF LAW, SCI. & TECH. 25, 28 (2024). For an edited volume on the potential impacts of artificial intelligence on the practice of law, see generally AI LEGAL ISSUES., *supra* note 30.

[33] Villasenor, *supra* note 32, at 28.

[34] *Id.*

"impacts a completely different part of the workflow than the storage, search, and information access advances that have been the focus of most of the technology change in the legal profession in recent decades."[35] Moreover, GenAI "can be applied in law in many different ways," including "to accelerate legal research and to produce drafts of text for use in contracts, regulatory filings, court rulings, academic papers, wills, trusts, patent specifications, affidavits, articles of incorporation, and more."[36]

C. New Technologies' Hallucinations and the Initial Judicial Response

Some predicted that GenAI threatened to undermine, if not completely displace, the work of lawyers in many different areas.[37] But those who preached caution when it came to the widespread use and adoption of GenAI in the practice of law would soon have ample evidence that reliance on GenAI by lawyers and non-lawyers alike posed significant risks due to the potential to produce inaccurate results, or "hallucinations."[38] Indeed, once journalists and others identified that GenAI chatbots can produce inaccurate, if not outright bizarre, results, it became apparent that this new technology was perhaps not the disruptive force in relation to the legal profession that some were predicting.[39] Not long after *New York Times* journalist Kevin Roose revealed the disturbing responses he received from a GenAI chatbot, including its profession of love for Roose and the suggestion that Roose leave his spouse for the bot,[40] news broke that a group of

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[35] *Id.*

[36] *Id.* at 31.

[37] *See* THOMSON REUTERS, *supra* note 5 (describing potential impacts of AI on the practice of law).

[38] For a recent analysis of the hallucination rate of even the more specific large-language models created by the leading legal research providers, see VARUN MAGESH ET AL., HALLUCINATION-FREE? ASSESSING THE RELIABILITY OF LEADING AI LEGAL RESEARCH TOOLS (2024), https://dho.stanford.edu/wp-content/uploads/Legal_RAG_Hallucinations.pdf [https://perma.cc/3SPV-NEKV].

[39] Richard Tromins, *The End of Lawyers? Not Yet*, ARTIFICIAL LAWYER (May 16, 2023), https://www.artificiallawyer.com/2023/05/16/the-end-of-lawyers-not-yet/ [https://perma.cc/NE3Q-YP3F] (last visited July 31, 2024).

[40] Kevin Roose, *A Conversation with Bing's Chatbot Left Me Deeply Unsettled*, N.Y. TIMES (Feb. 16, 2023), https://www.nytimes.com/2023/02/16/technology/bing-chatbot-microsoft-chatgpt.html [https://perma.cc/XC22-E7KL (staff-uploaded,

lawyers had submitted legal filings citing authorities produced by GenAI that, it turned out, had no basis in law. They were completely fictitious, and, as the next Section shows, led to significant consequences for the lawyers involved.

D. Ex Post *Punishments for Improper Use of GenAI*

In *Mata v. Avianca*,[41] the plaintiff's lawyers in a personal injury action submitted their opposition to a motion to dismiss and included cases in their filings that those lawyers found using ChatGPT.[42] Such cases appeared to support the plaintiff's position and allegedly warranted denial of the defendants' motion.[43] According to the testimony provided by one of the lawyers who had utilized the technology as part of the chatbot-assisted research, the lawyer used a range of prompts directed at the technology, including the following: "provide case law," "show me specific holdings," "show me more cases," and "give me some cases."[44] As the trial court found upon a review of the process the lawyer used in conducting his research and locating cases in support of his position, "the chatbot complied by making them up."[45] Making matters worse, one of the lawyers claimed he posed additional queries to the chatbot, asking it whether the cases were legitimate—which the technology confirmed.[46] After conducting its inquiry into the lawyers' behavior and their explanations for why they had submitted these fictitious cases, the court found that the lawyers had not only inappropriately relied on the technology in their presentation of their opposition to the motion, but they had also not been wholly forthcoming when describing their actions.[47] Accordingly, the trial court sanctioned the lawyers who had engaged in these actions

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dark archive)]. The entirety of the conversation between Roose and the chatbot can be found here: Kevin Roose, *Bing's A.I. Chat: 'I Want to Be Alive.* 😈', N.Y. TIMES (updated Feb. 17, 2023), https://www.nytimes.com/2023/02/16/technology/bing-chatbot-transcript.html [https://perma.cc/6WDQ-EYW9 (staff-uploaded, dark archive)].

[41] 678 F. Supp. 3d 443 (S.D.N.Y. 2023).

[42] *Id.* at 456

[43] *Id.*

[44] *Id.* at 457.

[45] *Id.*

[46] *Id.* at 458.

[47] *Id.* at 461–66.

under both Rule 11 of the Federal Rules of Civil Procedure and the court's inherent powers.[48]

Despite the attention the *Mata* case generated, both lawyers and *pro se* litigants have continued to exhibit misplaced reliance on the product of GenAI tools, and courts continue to issue sanctions for such conduct after the fact.[49] More recently, the Court of Appeals for the Second Circuit had the opportunity to review an attorney's filings that cited a nonexistent case, with the attorney claiming that she had found the authority using GenAI.[50] According to the lawyer's explanation: ChatGPT, on which the attorney relied, had "previously provided reliable information, such as locating sources for finding an antic [sic] furniture key. The case [the lawyer cited] . . . was suggested by ChatGPT."[51] The Second Circuit found that, "at the very least," the duties imposed on lawyers by Rule 11 of the Federal Rules of Civil

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[48] *Id.* at 465.

[49] *See, e.g.*, Thomas v. Metro. Transp. Auth., No. 22-2659-CV, 2024 WL 1107841 (2d Cir. Mar. 14, 2024) (affirming dismissal of *pro se* plaintiff's complaint containing broad and conclusory allegations under Rule 12(b)(6) for failure to state a claim after twice affording them the opportunity to amend the briefing issues identified by the district court including fabricated or hallucinated citations to authority); Froemming v. City of W. Allis, No. 23-2380, 2024 WL 261315 (7th Cir. Jan. 24, 2024) (affirming district court's denial of *pro se* motion containing baseless claims unsupported by legal authority and granting defendant's motion for Rule 38 monetary sanctions in the amount of $5,000 for frivolous filings containing numerous citations to cases that do not exist and false quotations from the one's that do); Whaley v. Experian Info. Sols., Inc., No. 3:22-CV-356, 2023 WL 7926455 (S.D. Ohio Nov. 16, 2023) (dismissing claim without prejudice and granting leave to amend unclear and potentially frivolous complaint which *pro se* litigant admitted was a result of artificial intelligence use to prepare case filings); Morgan v. Cmty. Against Violence, No. 23-CV-353-WPJ/JMR, 2023 WL 6976510 (D.N.M. Oct. 23, 2023) (dismissing multiple claims with or without prejudice and granting *pro se* plaintiff leave to file an amended complaint while warning them that future filings with citations to fake or nonexistent cases will result in Rule 11 sanctions); Taranov v. Area Agency of Greater Nashua, No. 21-CV-995-PB, 2023 WL 6809637 (D.N.H. Oct. 16, 2023) (dismissing *pro se* action under Rule 12(b)(6) for failure to state a claim without prejudice and finding such claim meritless and unsupported by irrelevant and mostly nonexistent case law); Esquivel v. Kendrick, No. 22-50979, 2023 WL 5584168 (5th Cir. Aug. 29, 2023) (denying appeal and affirming district court's dismissal of *pro se* plaintiff's claim as substantive arguments were raised for the first time on appeal with citations to nonexistent authority).

[50] Park v. Kim, 91 F.4th 610 (2d Cir. 2023).

[51] *Id.* at 614. The lawyer "wish[ed] to clarify that [she] did not cite any specific reasoning or decision from this case." *Id.*

Procedure "require that attorneys read, and thereby confirm the existence and validity of, the legal authorities on which they rely."[52] The Second Circuit went on to refer the attorney to the court's grievance panel because the reliance on "non-existent authority reveal[ed]" that the attorney "failed to determine that the argument she made was 'legally tenable,' " as she presented a "false statement of law to [the] [c]ourt" and "made no inquiry, much less the reasonable inquiry required of Rule 11 and long-standing precedent, into the validity of the arguments she presented."[53]

In another case out of the Southern District of New York, District Judge Jesse Furman declined to sanction the lawyer representing defendant Michael Cohen[54] for reliance on cases supplied to the lawyer by Cohen.[55] In conducting research to aid his attorneys, Cohen used the GenAI tool Google Bard when conducting research to support his position.[56] The lawyer was unaware that, after back and forth between several attorneys, the cases ultimately cited in the brief came from a GenAI application.[57] The district court found that the lawyer's "citation to non-existent cases [was] embarrassing and certainly negligent, perhaps even grossly negligent. But the Court [could not] find that it was done in bad faith," and thus did not impose sanctions on the lawyer.[58] Similarly, the district court considered whether to sanction Cohen himself. In declining to do so, the court found that "it would have been downright irrational" for Cohen to have provided fake cases to his attorney "knowing they were fake—given the probability that [the lawyer] would discover the problem himself and not include the cases in the motion . . . [or] that the issue would be discovered by the Government or Court, with potentially serious adverse consequences for Cohen himself."[59]

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[52] *Id.* at 615.

[53] *Id.* (citations omitted).

[54] Colby Hamilton, *Michael Cohen Officially Disbarred in New York State*, N.Y.L.J. (Feb. 26, 2019) https://www.law.com/newyorklawjournal/2019/02/26/cohen-officially-disbarred-in-new-york-state/ [https://perma.cc/NZ69-8W62] (describing Cohen as "former attorney and fixer to Donald Trump").

[55] United States v. Cohen, No. 18-CR-603, 2024 WL 1193604 *6 (S.D.N.Y. Mar. 20, 2024).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*

While the cases described here have all involved attorneys (and one former attorney), there have also been a number of cases in which courts have noted that GenAI was used by *pro se* litigants.[60] Most of those cases do not address those uses directly. Nor have courts appeared to issue sanctions against such litigants for their use of those tools. The one case that did, *Kruse v. Karlen*,[61] involved a worker who successfully sued for back wages from her former employers.[62] One of the defendants in that case appealed the ruling and utilized GenAI to prepare his filings before the appellate court. In those filings, the appellate court noted:

> Appellant submitted an Appellate Brief in which the overwhelming majority of the citations are not only inaccurate but entirely fictitious. Only two out of the twenty-four case citations in Appellant's Brief are genuine. The two genuine citations are presented in a section entitled Summary of Argument without pincites and do not stand for what Appellant purports.[63]

The court ultimately went on to award partial attorney's fees to the plaintiff-respondent because the appellant's actions "required Respondent to expend more resources than necessary to decipher the record and arguments" and "identify the fictitious cases Appellant wrongly presented to [the] [c]ourt" when the respondent's appeal "wholly lacked merit."[64]

E. A Typology of the Threats that GenAI Poses to the Legal System

As described above, GenAI holds some promise for narrowing the justice gap and for making legal practice more efficient and effective.[65] At the same time, it is quite clear that GenAI has not reached the level where a lawyer or *pro se* litigant should or could rely on the outputs produced by this technology when preparing legal filings.[66] Moreover, the instances where litigants have relied on these outputs to their detriment have led to the imposition of a range of sanctions.[67] The legal system, and individual litigants in particular, must approach the use of GenAI with great caution. One might find oneself submitting

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[60] *See* collected cases cited *supra* note 49.
[61] *Kruse v. Karlen*, 692 S.W.3d 43 (Mo. Ct. App. 2024).
[62] *Id.* at 47–49.
[63] *Id.* at 48–49.
[64] *Id.* at 54.
[65] *See supra* Part II.B.
[66] *See supra* Part II.C.–D.
[67] *See supra* Part II.D.

court filings containing nonexistent authorities—the product of GenAI hallucinations. This Subpart lays out the dangers that the unbridled use of GenAI in legal filings poses to the courts and the litigants who function within them. In response to these dangers, courts have begun to craft complementary rules designed to provide another layer of protection that might discourage litigants from the improper use of GenAI in their court filings.[68]

In Judge Castel's opinion issuing sanctions in *Mata*, he described some of the harms that GenAI can cause when used improperly in litigation:

> Many 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 may be tempted to defy a judicial ruling by disingenuously claiming doubt about its authenticity.[69]

Indeed, one of the primary threats that GenAI poses to the functioning of court systems is that—when the technology hallucinates and litigants submit error-ridden pleadings and court filings based on those hallucinations—judges, court staff, and adversaries will waste time and energy checking the validity of the fictitious sources submitted, which could serve as the basis for legal arguments and claims.[70]

Related to these threats, it is likely that GenAI will empower more aggressive litigants to multiply their filings in both length and complexity. Some *pro se* litigants throughout the American court system already submit prolix filings, asserting that the American income tax system is unconstitutional or that they are "sovereign citizens" not subject to the jurisdiction of any domestic legal system.[71]

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[68] *See infra* Part III.C. (describing these rules in detail).

[69] Mata v. Avianca, 678 F.3d. 443, 448–49 (S.D.N.Y. 2023) (footnote omitted).

[70] *See id.*

[71] The sovereign citizens movement has been described as "an utterly frivolous attempt to avoid the statutes, rules, and regulations that apply to all litigants." Mells v. Loncon, No. CV418-296, 2019 WL 1339618, at *2 (S.D. Ga. Feb. 27, 2019) (emphasis omitted). As one court has explained, "[a] so-called 'sovereign citizen'

Similarly, prisoners and detainees sometimes file lengthy *pro se* pleadings articulating highly dubious claims.[72] Even before the introduction of GenAI to *pro se* litigants, these litigants often found ways to submit outlandish claims, burdening court systems.[73] Now, *pro se* litigants in various contexts could rely on the product of GenAI tools to further amplify and multiply their pleadings, creating an even greater burden on the courts and the litigants who might appear as adversaries.[74]

Admittedly, *pro se* litigants who might seek to weaponize the legal system in the ways described in the previous paragraph might represent a small fraction of all litigants who file cases or defend themselves in litigation. Still, with *pro se* litigants—or even those represented by

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generally relies 'on the Uniform Commercial Code ("UCC"), admiralty laws, and other commercial statutes to argue that, because he has made no contract with [the court or government], neither entity can foist any agreement upon him.'" Pitts v. Smith, No. 22-CV-00162, 2022 WL 18832251, at *3 (M.D. Ga. Dec. 28, 2022) (alteration in original) (citation omitted); *see also* Trevino v. Florida, 687 F. App'x 861, 862 (11th Cir. 2017) (per curiam) (finding sovereign citizen arguments frivolous and "clearly baseless").

[72] In the 1990s, Congress passed several statutes designed to rein in what it saw as frivolous litigation by prisoners. As the court explained in *Walker v. O'Brien*:

> The passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub.L. No. 104–132, 110 Stat. 1214 (1996), and the Prison Litigation Reform Act (PLRA), Pub.L. No. 104–134, § 801 et seq., 110 Stat. 1321–66 (1996), which became effective on April 24, 1996 and April 26, 1996, respectively, ushered in a new and far more restrictive era for prisoner litigation. A critical feature of both statutes was the creation of gatekeeping mechanisms designed to keep frivolous suits out of the federal courts.

216 F.3d 626, 628 (7th Cir. 2000). That is not to say that all prisoner cases are frivolous, unlike the claims made by so-called sovereign citizens, and courts must take care not to paint such prisoner cases with too broad a brush. *See, e.g.*, Hernandez v. Denton, 861 F.2d 1421, 1430–33 (9th Cir. 1989) (Aldisert, J., concurring in part and dissenting in part) (describing importance of courts balancing out need to manage frivolous prisoner cases efficiently while preserving the ability of meritorious prisoner cases to go forward). For an overview of trends in inmate litigation generally, see *Margo Schlanger, Inmate Litigation,* 116 HARV. L. REV. 1555 (2003).

[73] *See, e.g.*, Muhammad v. Smith, No. 13-CV-760, 2014 WL 3670609, at *2 (N.D.N.Y. July 23, 2014) ("Theories presented by redemptionist and sovereign citizen adherents have not only been rejected by courts, but also recognized as frivolous and a waste of court resources.").

[74] *See, e.g.*, *supra* text accompanying notes 60–64 (describing *pro se* litigants' use of GenAI).

counsel who attempt to conduct their own legal research—using GenAI might give them a false sense of the strengths (or weaknesses) of their legal claims. This might lead them to press their claims under a misguided sense of their legal positions' validity. What is more, in courts with even fewer resources than the federal courts, it will be markedly harder for judges and adversaries—who might be *pro se* themselves—to double-check the work submitted by litigants relying on GenAI. If an overburdened judge is unable to check citations and a *pro se* adversary is unable to rigorously review them (as is necessary in the adversarial system), then it is quite possible that a fictitious case might make its way into the legal bloodstream. A judge might cite one of these cases as binding authority, thereby transmogrifying such fictitious authorities into legitimate ones.

In *Mata*, the court appended the fictitious cases cited by the plaintiff's lawyers.[75] But, without the ability to conduct thorough research on the legitimacy of those opinions, one would be hard-pressed to determine that those opinions were fictitious. In courts where otherwise unreported cases are often appended to briefs by litigants,[76] it is possible that courts might soon inadvertently rely on such opinions as useful, if not binding, authority.

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This Section has outlined some of the *ex post* interventions that courts have utilized to sanction litigants who have used GenAI carelessly, if not maliciously. As one purpose behind the court's sanctioning powers is to deter future inappropriate behavior, the punishments likely meted out by courts in these cases will have some deterrent effect. At the same time, if courts are to look at the harms that improper reliance on fictitious authorities threatens to cause, punishment after the fact—apart from its deterrent effect in other cases—is unlikely to prevent at least some of those harms, especially the wasting of court and litigant time. As the next Section explores, courts are beginning to examine ways to create *ex ante* interventions

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[75] The appendix to the court's decision in *Mata*, which contains the text of the fictitious opinions, can be found at 678 F. Supp. 3d at 467–75.

[76] *See, e.g.*, PA. R. APP. P. R.126(a) ("A party citing authority that is not readily available shall attach the authority as an appendix to its filing. When citing authority, a party should direct the court's attention to the specific part of the authority on which the party relies.").

that might prevent the improper use of GenAI tools. Moreover, these approaches align well with what is known as New Governance Theory. The discussion will now turn to these phenomena.

III. *EX ANTE* JUDICIAL RESPONSES TO GENAI AS EXAMPLES OF NEW GOVERNANCE APPROACHES TO REGULATING BEHAVIOR

This Part will explore some of the interventions that court systems, and even some individual judges, are deploying to rein in the improper use of GenAI tools in litigation. These interventions bear the hallmarks of regulatory approaches—clustered under the approach to regulatory oversight—that has come to be known as New Governance Theory. This Part first describes New Governance Theory and shows that its features are common in both oversight of the legal profession in general and the rules that govern civil litigation. Then, this Part offers a typology of the various *ex ante* interventions that courts and judges are deploying to deter the improper use of GenAI tools in civil litigation. Finally, this Part shows how such interventions align well with New Governance approaches and the benefits that might emerge.

A. The Emergence of New Governance Models to Regulate Behavior in Dynamic Settings

New Governance approaches begin with the premise that key stakeholders in any field subject to regulation—including regulators, the regulated, and those protected by such regulation—should participate in crafting the regulatory regime that should both shape and control behavior within it.[77] Contrasted with the "top-down" system of command-and-control regulation, New Governance models strive to create flexible, adaptable, and bottom-up systems, fostering greater buy-in and support among the regulated and the beneficiaries of such regulation. This occurs largely because the interests of all critical stakeholders are considered, from the development of such regimes to the enforcement phase. This creates an informational feedback loop

[77] For an overview of New Governance Theory, see, for example, IAN AYRES & JOHN BRATHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (Donald R. Harris et al. eds., 1992); Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875 (2003); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentation*, 98 COLUM. L. REV. 267 (1998).

that allows for modification of the regime: As the elements of the regime face reality on the ground, they incorporate changes that might occur in a given regulated environment.[78]

The New Governance approach represents democratic, participatory, and representative ideals.[79] Instead of relying solely on the expertise of lawmakers and coercive, punitive regulatory techniques, New Governance processes welcome the insights and experience of regulated entities, domain experts, and consumers—whose unique perspectives do not typically inform traditional rulemaking processes.[80] This spirit of openness is further advanced by non-coercive methods of oversight that privilege "soft-law" models, including a stated preference for self-regulation and disclosure-based regulatory systems as opposed to more invasive "hard-law" oversight

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[78] As Orly Lobel has explained, some common features of New Governance models include increased stakeholder participation, public-private collaboration, decentralized decision making and rule generation, a preference for soft-law approaches, and adaptability. Orly Lobel, *New Governance as Regulatory Governance*, *in* OXFORD HANDBOOK OF GOVERNANCE 66, 66–67 (David Levi-Four, ed., 2012) (reference omitted).

[79] For the argument that New Governance approaches promote these ideals, among others, see, for example, Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 344–45 (2004) [hereinafter Lobel, *Renew Deal*] ("The new governance model supports the replacement of the New Deal's hierarchy and control with a more participatory and collaborative model, in which government, industry, and society share responsibility for achieving policy goals. The adoption of governance-based policies redefines state-society interactions and encourages multiple stakeholders to share traditional roles of governance."); Amy J. Cohen, *Governance Legalism: Hayek and Sabel on Reason and Rules, Organization and Law*, 2010 WIS. L. REV. 357, 382–84 (2010) (describing how two different sources of New Governance Theory converse with one another in the contemporary scholarship); Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239, 239 (2010) (examining whether the proliferation of "experiments in policy, program structure, and governance frameworks" in state welfare programs resulted in the intended impact: one that was "more deeply accountable to individuals and communities").

[80] On the importance of the perspectives of non-traditional actors in the rulemaking process, see Lobel, *Renew Deal*, *supra* note 79, at 371–76; Michael Blasie, *A Separation of Powers Defense of Federal Rulemaking Power*, 66 N.Y.U. ANN. SURV. AM. L. 593, 597–98 (2011) (discussing this theme within the context of Federal Judicial Rulemaking specifically).

regimes.[81] What is more, flexible, non-coercive regulatory mechanisms encourage experimentation and create important feedback loops that allow the incorporation of information to reshape the regulatory landscape.[82] A New Governance approach is entrepreneurial because it "identif[ies] its customers, determin[es] their needs, and mov[es] forward to identify the best practices that would meet these needs."[83] In the end, the "organizing principles" of New Governance approaches include "flexibility, competition, adaptability, and learning."[84]

Another aspect of New Governance approaches that helps spur experimentation and create feedback loops is that decision-making is often decentralized and pluralistic so that any regulatory regime is responsive to the potentially diverse needs of local stakeholders.[85] Because of their flexibility and responsiveness to feedback loops and the potential for facts to change on the ground, New Governance approaches are particularly well-suited to settings that are either subject to change or evolving. This is especially true in areas where technological change is likely to outpace the ability of regulators to keep up with such change.[86] Having adaptable and responsive regulatory systems helps to encourage experimentation by the

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[81] *See, e.g.*, Kenneth W. Abbott & Duncan Snidal, *Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit*, 42 VAND. J. TRANSNAT'L L. 501, 529–32 (2009) (comparing "soft-" and "hard-law" approaches in New Governance scholarship).

[82] Dorf & Sabel, *supra* note 77, at 287–288.

[83] Lobel, *Renew Deal*, *supra* note 79, at 366.

[84] *Id.* at 366–67.

[85] On the role of decentralized rulemaking in New Governance Theory, see Lance Gable, *Evading Emergency: Strengthening Emergency Responses Through Integrated Pluralistic Governance*, 91 OR. L. REV. 375, 419 (2012) (citing Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, *in* THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE 1, 1–14 (Lester M. Salamon ed., 2002)); Lobel, *Renew Deal*, *supra* note 79, at 344.

[86] On the benefits of New Governance approaches in dynamic settings, see Dorf & Sabel, *supra* note 77, at 315 ("A central lesson of the limitations of New Deal institutions is that effective government services and regulations must be continuously adapted and recombined to respond to diverse and changing local conditions, where local may mean municipal, county, state, or regional as the problem requires.").

regulators and the regulated, fostering an entrepreneurial approach and supporting innovation while also working to prevent consumer harm.[87]

New Governance approaches have proliferated in a number of different contexts, such as occupational safety and health, securities regulation, and employment discrimination.[88] In the context of federal rulemaking, when federal agencies engage in the formal processes under the Negotiated Rulemaking Act,[89] they are foregoing the traditional model of federal rulemaking for a more open, flexible, and inclusive process that exhibits the hallmarks of New Governance approaches.[90] As Orly Lobel explained, some common features of New Governance models include increased stakeholder participation, public-private collaboration, decentralized decision-making and rule-generation, a preference for soft-law approaches, and adaptability.[91] For the following discussion concerning the New Governance features of legal ethics rules and oversight of civil litigation, some elements of particular relevance include stakeholder engagement in rulemaking,[92] a degree of self-regulation and oversight,[93] disclosure-based and information-forcing mechanisms,[94] decentralized rulemaking and

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[87] *See* Dorf & Sabel, *supra* note 77, at 314–23 (describing the importance of experimentation in New Governance models); Victoria Nourse & Gregory Shaffer, *Empiricism, Experimentalism, and Conditional Theory*, 67 SMU L. REV. 141, 166–77 (2014) (examining the experimentalism reflected in the New Governance movement as one of two complementary strands of the New Legal Realism movement); Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 78–89 (2011) (identifying the influence of experimentalism in policymaking contemporary to the time of publication).

[88] Jaime Alison Lee, *"Can You Hear Me Now?": Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL'Y REV. 405, 411 (2013) (citations omitted).

[89] 5 U.S.C. §§ 561–70

[90] *See id.*

[91] Lobel, *supra* note 78, at 66.

[92] On stakeholder engagement in New Governance Theory, see AYRES & BRAITHWAITE, *supra* note 77, at 82 ("An opportunity for participation by stakeholders in decisions over matters that affect their lives is a democratic good independent of any improved outcomes that follow from it.").

[93] On the frequent role of self-regulation in New Governance regulatory models, see generally Jason M. Solomon, *New Governance, Preemptive Self-Regulation, and the Blurring of Boundaries in Regulatory Theory and Practice*, 2010 WIS. L. REV. 591 (2010).

[94] For a description of disclosure-based mechanisms common in New Governance approaches, see Ruth Jebe, *Sustainability Reporting and New Governance: South Africa Marks the Path to Improved Corporate Disclosure*, 23 CARDOZO J. INT'L & COMP. L. 233, 247–64 (2015).

oversight,[95] and experimentation.[96] This Part's focus now shifts to these features of lawyer regulation and civil litigation.

B. New Governance, the Legal Profession, and Civil Litigation

1. New Governance and Oversight of the Legal Profession

The system for regulating the legal profession that has emerged over the last 150 years exhibits components that suggest it aligns well with New Governance Theory, including that it incorporates self-regulation, experimentation and decentralization, stakeholder engagement, and soft-law models.[97] Each of these features are described, in turn, below.

The regulatory model that the profession has developed over nearly the last two centuries is mostly one based on self-regulation, a common feature of New Governance approaches.[98] Prior to the creation of written codes of ethics in the late nineteenth century,[99] an extremely modest system based almost exclusively on the maintenance of lawyer reputation among the bench and bar was supposed to "regulate" attorney misconduct.[100] By century's end, states began to promulgate codes of conduct, and the American Bar Association ("ABA") created the Canons of Professional Ethics in 1908 and encouraged state bars and court systems to follow suit.[101] To this day,

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[95] For more on decentralized decision making in New Governance Theory, see Abbott & Snidal, *supra* note 81, at 524–28.

[96] On more on the role and importance of experimentation to New Governance models, see Dorf & Sabel, *supra* note 77, at 314–23; *see also* Nourse & Shaffer, *supra* note 87, at 166–77.

[97] Raymond H. Brescia, *Regulating the Sharing Economy: New and Old Insights into an Oversight Regime for the Peer-to-Peer Economy*, 95 NEB. L. REV. 87, 113–31 (2016). For a description of the ways in which the rules that govern the legal profession exhibit features of New Governance Theory, see *id.* at 135.

[98] *See* Solomon, *supra* note 93, at 622–24 (identifying the role of self-governance in New Governance Theory).

[99] On the first lawyers' codes of ethics, see generally Ray Brescia, Lawyer Nation: The Past Present, and Future of the American Legal Profession 72 (2024).

[100] On early efforts to promulgate ethical guidance for lawyers, which sometimes read like rules of etiquette rather than codes of conduct, see *id.* at 69–72.

[101] Am. B. Ass'n, *The Canons of Professional Ethics*, FINAL REPORT OF THE COMMITTEE ON CODE OF PROFESSIONAL ETHICS, 31 ANN. REP. A.B.A. 567, 568–72 (1908); *see also* RICHARD ABEL, AMERICAN LAWYERS 46 (1989) (noting ABA had

the self-regulatory features of the oversight of attorney conduct include the passage of codes of ethics and the imposition of responsibilities on supervisory lawyers to install appropriate systems in law offices to ensure ethical conduct.[102] In addition, lawyers have an affirmative duty to report other lawyers who exhibit behavior that raises "substantial question[s]" regarding those lawyers' fitness to practice law.[103] First, self-regulation of the legal profession is necessary because only those trained in the practice of law can understand the responsibilities of the profession and impose rules on that profession.[104] Second, lawyers require a degree of freedom from intrusion into their practice so that they may engage in zealous advocacy on behalf of clients.[105]

A second core feature the legal profession's oversight regime is that it is both decentralized and at least somewhat experimental, with standards evolving at the national level for adoption and adaptation by regulatory bodies at the state level.[106] Generally speaking, the ABA promulgates model rules for consideration at the state level, either by court systems or bar associations.[107] The ABA, though, has no authority to force state courts or state bar associations to adopt its model rules, so state regulatory bodies are free to set their own rules,

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no power to enforce its own recommendations as they related to the Canons of Professional Ethics and later efforts to impose stricter accreditation requirements on law schools).

[102] MODEL RULES OF PRO. CONDUCT r. 5.1 (AM. BAR ASS'N 2020) (noting duties of supervisory lawyers); *id.* r. 5.3 (outlining supervisory duties of lawyers toward non-lawyer staff).

[103] *Id.* r. 8.3 (imposing affirmative duty to report misconduct by another lawyer when such conduct raises substantial questions of a lawyer's fitness to practice law).

[104] For an overview of the justifications for lawyer independence, see generally Robert W. Gordon, *The Independence of Lawyer*s, 68 B.U. L. REV. 1 (1988).

[105] On lawyer independence, see Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued*, 46 AKRON L. REV. 599, 610 (2013). *See generally* Gordon Turriff, *The Importance of Being Earnestly Independent*, 2012 MICH. ST. L. REV. 281 (2012).

[106] For a history of the adoption of attorney codes of conduct, see Leonard M. Niehoff, *In the Shadow of the Shrine: Regulation and Aspiration in the ABA Model Rules of Professional Conduct*, 54 WAYNE L. REV. 3, 6–11 (2008).

[107] Robert J. Ambrogi, *Tech Competence: 40 States Have Adopted the Duty of Technology Competence*, LAWSITES, http://www.lawnext.com/tech-competence [https://perma.cc/29GR-VUXM] (last visited July 29, 2024) (discussing the role of the Model Rules and state adoption).

tinker with the ABA's recommended rules, or adopt them *verbatim*.[108] This diffusion of rulemaking allows for a degree of experimentation, which can occur sometimes at the margins or in more significant ways.[109] Moreover, at present, several states are explicitly engaging in experimental approaches to regulatory oversight by creating so-called "regulatory sandboxes" that give entities greater leeway to explore novel approaches in discrete areas of regulation, such as authorizing the creation of new business models.[110]

A diverse range of stakeholders—including the practicing bar, members of the bench, academics, and, to a lesser extent, consumers—participate in rulemaking and enforcement of the rules.[111] As described above, the ABA makes recommendations to the states concerning model rules that are themselves generated through discussion, debate, and public comments at the national level, including ABA leadership and various stakeholders within the legal community.[112] A similar array of stakeholders are typically involved in the debates around promulgating state rules.[113] Though consumers of legal services have not played a significant role in the rulemaking process, some states

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[108] Devin S. Mills & Galina Petrova, *Modeling Optimal Mandates: A Case Study on the Controversy over Mandatory Professional Liability Coverage and its Disclosure*, 22 GEO. J. LEGAL ETHICS 1029, 1032 n.22 (2009) (noting authority of states to modify rules suggested by the ABA).

[109] Charles W. Wolfram, *Parts and Wholes: The Integrity of the* Model Rules, 6 GEO. J. LEGAL ETHICS 861, 901 (1993) (describing areas in which states have engaged in some degree of rule-based experimentation).

[110] *See* Ralph Baxter, *Dereliction of Duty: State Bar Inaction in Response to America's Access-to-Justice Crisis*, 132 YALE L.J. F. 228, 254–56 (Oct. 19, 2022) (quotation omitted) (describing the concept of ethical sandboxes).

[111] Jaime Alison Lee, *"Can You Hear Me Now?": Making Participatory Governance Work for the Poor*, 7 HARV. L. & POL'Y REV. 405, 406 (2013) (describing as a "core principle" of New Governance Theory "a commitment to decentralized problem solving by local stakeholders, and the ongoing adjustment of rules and policies informed by on-the-ground monitoring and feedback").

[112] *See* Michael Ariens, *The Last Hurrah: The Kutak Commission and the End of Optimism*, 49 CREIGHTON L. REV. 689, 697–721 (2016) (describing the legislative history of the development of the ABA's Model Rules of Professional Conduct).

[113] *See., e.g.*, Judith S. Kaye, *New York State Bar Association Report of the Task Force on Nonlawyer Ownership,* 76 ALB. L. REV. 865 (2013) (noting development of public comments on a proposed rule, but listing membership of task force as exclusively lawyers, law professors, and members of the state bench).

have begun to incorporate the voices of diverse community representatives in discussions around the adoption of state rules.[114]

Finally, when rules are actually adopted at the state level, they tend to appear more like "standards" rather than "rules," resulting in a regulatory approach that favors so-called "soft" law models over ones based on "hard" law imposed through a command-and-control system.[115] The main reason behind such an approach is that the practice of law is extremely dynamic and unpredictable, with lawyers often confronting complex and novel situations on a regular basis. As a result, it is difficult to predict, let alone regulate with particularity, every interaction and decision lawyers must make.[116] Given the desire to provide lawyers with a degree of leeway and creativity in the practice of their craft, the preferred approach to the legal profession's regulation is one in which the rules provide general guidance, such as requiring competent representation and prohibiting unreasonable fees[117] (although some specific rules, mostly having to do with conflicts of interest, also apply[118]). However, the so-called rules that govern the legal profession are better characterized as standards, as they largely provide general guidance for ethical conduct as opposed to specific prohibitions designed to direct conduct in every conceivable situation.[119]

For these reasons, the oversight regime that guides attorney conduct exhibits some of the key features of New Governance Theory.

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[114] *See, e.g.*, Judy Perry Martinez & Geoffrey Thomas Burkhart, *Report on the Future of Legal Services in the United States: 12 Recommendations for Improving the Delivery of Legal Services to the American Public*, 86 BAR EXAMINER 17, 17–19 (2019) (describing extensive solicitation of community input as part of the work of the ABA Committee on the Future of Legal Services).

[115] For a discussion of soft law and New Governance Theory, see generally David M. Trubek & Louise G. Trubek, *Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Coordination,* 11 Eur. L.J. 343 (2005).

[116] *See* MODEL RULES OF PRO. CONDUCT r. 5.1 Preamble & Scope, ¶¶ 15–16 (AM. BAR ASS'N 2020).

[117] *Id.* at R. 1.5(a) (prohibiting unreasonable fees); *id.* at r. 1.8(a) (outlining procedures necessary to engage in a business transaction with a client).

[118] *Id.* at r. 1.8(a).

[119] Michele M. DeStefano, *Advocacy in the Court of Public Opinion, Installment Two: How Far Should Corporate Attorneys Go*, 23 GEO. J. LEGAL ETHICS 1119, 1195 (2010) (explaining that "despite their increased specificity" the rules that govern the legal profession are still "standards as opposed to hard and fast rules").

As the following discussion shows, the rules that govern civil litigation also exhibit some of these same features.

2. New Governance and the Rules of Civil Litigation

The rules governing civil practice in the federal trial courts emerge from a process that incorporates key features of New Governance. Under Article III of the Constitution, Congress holds the ultimate responsibility for establishing lower courts as it may "from time to time, ordain and establish" those courts.[120] In turn, Congress, through the Rules Enabling Act,[121] has delegated the responsibility of amending the rules governing civil matters to the judiciary.[122] Pursuant to that authority, there exists a Standing Committee of the Judicial Conference of the United States, known as the Committee on Rules of Practice and Procedure.[123] That second committee reviews and develops formal recommendations for changes to the rules that may emerge from any of the five advisory committees organized within it.[124] The Standing Committee then offers suggestions for proposed rule changes to the Judicial Conference of the United States.[125] The memberships of the Standing Committee and those advisory committees include

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[120] U.S. CONST., art. 3, § 1 (placing judicial power in the Supreme Court and such inferior courts as Congress may create); *id.* at art. I, § 8 (Congress's power to create inferior courts); *see also* Joseph R. Biden, Jr., *Congress and the Courts: Our Mutual Obligation*, 46 STAN. L. REV. 1285, 1288–90 (1994) (describing Congress's authority to make rules for the courts and the fact that it has delegated much of that authority to the courts themselves); Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 737–38 (1995) (describing rulemaking authority).

[121] 28 U.S.C. §§ 2071–77.

[122] § 2073(b).

[123] *See id.* ("The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence"). For a description of this committee, including its basis in law, membership, and its historical origins, see Blasie, *supra* note 80, at 596–98.

[124] *See* § 2073(b) ("Such standing committee shall review each recommendation of any other committees so appointed and recommend to the Judicial Conference rules of practice, procedure, and evidence and such changes in rules proposed by a committee appointed under subsection (a)(2) of this section as may be necessary to maintain consistency and otherwise promote the interest of justice.").

[125] For a description of the standing committees, see Thomas E. Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 TEX. TECH. L. REV. 323, 328–31 (1991).

stakeholders from across the legal profession.[126] A federal judge serves as chair of each committee, and each committee generally has a reporter, typically a member of the legal academy, who is responsible for coordinating the committee's work.[127]

The Judicial Conference meets twice per year and issues a Report of the Proceedings that describes any recommendations that arise from those meetings.[128] A proposed rule may emerge from an advisory or standing committee, which is then subject to public comment.[129] Recommendations revised in light of public commentary are sent to the general Standing Committee,[130] which takes up any proposals. If the committee considers any recommendations appropriate for adoption, it will forward them to the Judicial Conference.[131] If this body approves the recommended changes, it will pass them along to the Supreme Court of the United States.[132] If the Supreme Court approves the recommended changes, it transmits those changes to Congress, at which point Congress retains a statutory time period in which it can enact legislation to reject, modify, or defer the amendment.[133] Congress can also take no action and acquiesce in the proposed change, in which case it holds the force of law without congressional action.[134]

At the federal courts of appeals, the chief judge of each circuit convenes a council consisting of an equal number of circuit and district judges to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit."[135] Below that, at the district court level, "boards of judges" typically propose local court rules for their respective districts after a period for public

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[126] These stakeholders include federal judges, practicing lawyers, law professors, state chief justices, and representatives of the U.S. Department of Justice. *Id.* at 329.

[127] *See id.*

[128] *See About the Judicial Conference*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference [https://perma.cc/P43M-XD8A] (last visited Sept. 21, 2024).

[129] *See* Baker, *supra* note 125, at 329–31.

[130] *Id.* at 329.

[131] *Id.* at 330–31.

[132] *Id.* at 331.

[133] *Id.*

[134] *Id.*

[135] 28 U.S.C. § 332(d)(1).

comment.[136] Once those comments are received, the proposed amendments are passed to the circuit court for approval.[137]

The process by which the rules of civil litigation are amended exhibits shades of New Governance approaches, particularly since this process typically includes a range of stakeholders. However, there is still self-certification[138] as well as efforts designed to encourage private engagement to resolve disputes short of invoking a district court's intervention.[139] As the following discussion shows, the development of court system rules and standing orders of individual judges for GenAI use in civil litigation exhibit many similar New Governance features.

C. A Typology of the Rules Addressing the Use of GenAI in Litigation

Apart from the *ex post* sanctions orders issued in the cases described above,[140] a relatively small but growing group of court systems and individual judges have promulgated orders that address litigant use of GenAI in court pleadings and other filings.[141] Unlike their backward-looking corollaries of sanctions orders, these standing orders set forth a range of different *ex ante* directives. Their contents range from modest warnings about the potential risk that using such

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[136] As an example of how this process works, in the Northern District of New York, proposed rules—whether directly submitted via public comments or derived from public comments—must be approved by both a board of district judges and a board of circuit judges. *See* Press Release, U.S. Dist. Ct., N. Dist. of N.Y., Amendments to the NDNY Local Rules, https://www.nynd.uscourts.gov/content/amendments-ndny-local-rules [https://perma.cc/V26D-BA3P] (click link titled "Amendments of NDNY Local Rules effective January 1 2023.pdf") (last visited Sept. 21, 2024).

[137] *See* Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533, 545 (2002) ("The Judicial Conference supported the 1985 revisions of Federal Rule of Civil Procedure 83 and Federal Rule of Criminal Procedure 57, which mandated that districts prescribe local rules after providing notice, and an opportunity for comment, to the public and that standing orders which individual judges issue not contravene the Federal Rules of Civil or Criminal Procedure or local rules.").

[138] *See* FED. R. CIV. P. 11(b) (requiring self-certification of merits of claims and factual assertions).

[139] *See* FED. R. CIV. P. 37(d)(1)(B) (requiring that litigants certify they have attempted to resolve a dispute before bringing it to court).

[140] *See supra* Part II.D.

[141] *See infra* Part III.C.1–7.

tools poses to outright prohibitions on their use in court filings. The analysis included in this Section provides an overview of individual standing orders and court rules generated by judges and court systems, such as individual district courts. The focus is exclusively on federal courts and does not explore the possibility that individual judges or even entire state court systems have developed rules regarding the use of GenAI in litigation. Instead, this Article's focus is on the promulgation of rules relating to this technology in the federal judicial system alone, specifically in civil litigation.

Through outlining a general typology of these rules and standing orders, what first stands out is that, at present, the overwhelming majority of judges in the federal system have issued no such orders and are operating under no special rule regarding GenAI. It is possible that, at some point, the Federal Rules Committee will promulgate a rule of general applicability and incorporate it into the Federal Rules of Civil Procedure. However, that has not yet happened.

This overview shows that these interventions can be classified based on the nature of the prohibitions or guidance they might offer. It also demonstrates that these interventions exhibit features of New Governance models. Moreover, this analysis can help inform efforts to take a holistic approach in the promulgation of such rules with more general applicability, including at the level of the Federal Rules, but also in individual court systems. At the same time, this typology shows that courts and even individual judges are experimenting with different approaches to discourage the improper use of GenAI (as well as some prohibiting it altogether) to prevent the sorts of harms described above.

With these thoughts in mind, the following sets forth a typology of the different elements of the standing orders and court rules that judges have issued as they relate to the use of GenAI in court filings. This typology shows that judicial responses range from mere warnings and disclosures to outright prohibitions. In addition, some of the approaches more commonly taken by judges and courts exhibit New Governance-style characteristics. The remainder of this Part explores the different types of orders and places them along a continuum from least intrusive to most prohibitive. This Section also describes one U.S. Circuit Court of Appeals's efforts to amend its appellate practice rules in light of new technologies, the stiff resistance it encountered from

the practice bar, and its ultimate retreat from the proposed amendment.[142] After laying out this typology of judicial interventions, this Section reveals how they exhibit many of the features common in New Governance models.

1. Simple Warnings and Reminders

The first type of order in this typology includes those in which courts have tried to create a modest amount of "friction" or "meaningful inefficiency" to ensure litigants think twice before filing pleadings that might include fictitious authorities produced by GenAI.[143] In the Southern District of New York, Federal District Judge Arun Subramanian's standing order simply warns litigants of the dangers of using GenAI to prepare their filings.[144] Judge Iain Johnston goes a bit further, however, as his order explains that some court "standing orders—which are unfortunately necessary—are often terse reminders that *all filers* need to follow statutes, the Federal Rules of Civil Procedure, and the Local Rules for the U.S. District Court for the Northern District of Illinois."[145] With this idea in mind, his order provides:

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[142] *See infra* Part III.C.7.

[143] On the concept of meaningful inefficiency, see ERIC GORDON & GABRIEL MUGAR, MEANINGFUL INEFFICIENCIES: CIVIC DESIGN IN AN AGE OF DIGITAL EXPEDIENCY 7–8 (2020); *see also* OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 19 (1985) (defining transaction costs as "the economic equivalent of friction").

[144] Individual Practices in Civil Cases at 7 (S.D.N.Y. July 29, 2023) (Judge Subramanian), https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AS%20Subramanian%20Civil%20Individual%20Practices.pdf [https://perma.cc/7JZY-MMZY].

[145] Artificial Intelligence (AI) (N.D. Ill.) (Judge Johnston), https://www.ilnd.uscourts.gov/judge-info.aspx?Bt1LmR2QgBbCj2VD6w9tXA== [https://perma.cc/KS7S-AZTK] (click link titled "Artificial Intelligence (AI)") (last visited Oct. 12, 2024). The order also refers to the following article on the topic: Maura R. Grossman, Paul W. Grimm & Daniel G. Brown, *Is Disclosure and Certification of the Use of Generative AI Really Necessary?*, 107 JUDICATURE 68 (2023), https://judicature.duke.edu/wp-content/uploads/2023/10/AIOrders_Vol107No2.pdf [https://perma.cc/C55C-S5BK]. Judge Rita F. Lin has issued a similar order, making clear that the use of GenAI is "not prohibited," but that counsel must "personally confirm for themselves the accuracy of any research conducted by these means, and counsel alone bears ethical responsibility for all statements made in filings." Standing Order for Civil Cases Before Judge Rita F. Lin at 6 (N.D. Cal. May 17, 2024) (Judge

> Anyone—counsel and unrepresented parties alike—using [artificial intelligence ("AI")] in connection with the filing of a pleading, motion, or paper in this Court or the serving/delivering of a request, response, or objection to discovery must comply with Rule 11(b) and Rule 26(g) of the Federal Rules of Civil Procedure, and any other relevant rule, including any applicable ethical rule.[146]

In October 2023, the Eastern District of Texas amended its local rules regarding the use of artificial intelligence by both *pro se* litigants and attorneys. The district court cautions lawyers who rely on GenAI tools that such "technologies may produce factually or legally inaccurate content and should never replace the lawyer's most important asset—the exercise of independent legal judgment."[147] Accordingly, it reminds lawyers that if they should "choose[ ] to employ technology in representing a client, [they] continue[ ] to be bound by the requirements of Federal Rule of Civil Procedure 11, [local rules], and all other applicable standards of practice."[148] The district court also requires lawyers to "review and verify any computer-generated content to ensure that it complies with all such standards."[149] The district court imposes similar requirements on *pro se* litigants, seemingly incorporating the same standard to unrepresented litigants that it applies to attorneys.[150]

Finally, in this category of orders reminding litigants of their obligations under existing rules and their application to the use of GenAI, the rule issued by Magistrate Judge Jeffrey Cole of the Northern District of Illinois should be included. His order provides:

> Any party using AI in the preparation of materials submitted to the court must disclose in the filing that an AI tool was used to conduct legal research and/or was used in any way in the preparation of the submitted document. Parties should not assume that mere reliance on an AI tool will be presumed

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Lin), https://www.cand.uscourts.gov/wp-content/uploads/2023/03/2024-05-17-Civil-Standing-Order.pdf [https://perma.cc/8BBC-6WHW].

146 Artificial Intelligence (AI), *supra* note 145.

147 General Order 23-11, General Order Amending Local Rules at 4 (E.D. Tex. Oct. 30, 2023), https://txed.uscourts.gov/sites/default/files/goFiles/GO%2023-11%20Amending%20Local%20Rules%20Effective%20December%201%2C%2023.pdf [https://perma.cc/M7HZ-NLVC].

148 *Id.* at 2

149 *Id.*

150 *Id.*

> to constitute reasonable inquiry. The Federal Rules of Civil Procedure, including Rule 11, will apply.[151]

2. Disclosure with Certification of Accuracy

Some judges and courts have gone further. Beyond requiring that litigants disclose their use of GenAI in the preparation of filings, several judges have also required that litigants confirm the accuracy of such filings.[152] An example of a more detailed order of this nature is the one issued by Judge Araceli Martínez-Olguín, which provides:

> Use of ChatGPT or other such tools is not prohibited, but counsel must at all times personally confirm for themselves the accuracy of any content generated by these tools. At all times, counsel—and specifically designated lead trial counsel—bears responsibility for any submission made by the party that the attorney represents. Any submission containing AI-generated content must include a certification that lead trial counsel has personally verified the content's accuracy. Failure to include this certification or comply with this verification requirement will be grounds for sanctions. Counsel is responsible for maintaining records of all prompts or inquiries

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[151] The Use of "Artificial Intelligence" in the Preparation of Documents Filed Before this Court (N.D. Ill.) (Magistrate Judge Cole), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Cole/Artificial%20Intelligence%20standing%20order.pdf [https://perma.cc/4JDR-F993] (last visited, July 27, 2024). The order goes on to reiterate the point regarding the application of Rule 11 to any filing by providing that "a certification on a filing will be deemed as a representation by the filer that they have read and analyzed all cited authorities to ensure that such authorities actually exist and that counsel actually have assessed and considered the cited case or other authority offered in support or in contravention of the particular proposition." *Id.*

[152] Standing Order Re: Artificial Intelligence ("AI") in Cases Assigned to Judge Baylson (E.D. Pa. June 6, 2023) (Judge Baylson), https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/Standing%20Order%20Re%20Artificial%20Intelligence%206.6.pdf [https://perma.cc/2NUA-XB3R]; Standing Order for Civil Cases Assigned to Judge Stanley Blumenfeld, Jr. at 6 (C.D. Cal. Mar. 1, 2024) (Judge Blumenfeld), https://www.cacd.uscourts.gov/sites/default/files/documents/SB/AD/1.%20Civil%20Standing%20Order%20%283.1.24%29%20[Final].pdf [https://perma.cc/SUD8-3APN]; Judge's Procedures for Honorable Rosella A. Oliver Magistrate Judge (C.D. Cal.) (Magistrate Judge Oliver), https://www.cacd.uscourts.gov/honorable-rozella-oliver (last visited Oct. 12, 2024) [https://perma.cc/Q64G-6NT]. Before passing away in May of 2024, Judge Gene Pratter of the Eastern District of Pennsylvania had issued a similar order. Judge Gene E.K. Pratter's General Pretrial and Trial Procedures at 9 (E.D. Pa. Oct. 2023) (Judge Pratter), https://www.paed.uscourts.gov/sites/paed/files/documents/procedures/prapol2.pdf [https://perma.cc/2UV4-5CA6].

> submitted to any [genAI] tools in the event those records become relevant at any point.[153]

Along similar lines, Judge Stephen Vaden of the U.S. Court of International Trade offers a more robust disclosure requirement, providing that litigants must not only disclose GenAI use in filings but also confirm that no confidential client information was shared with the GenAI service the litigant used.[154]

3. Disclosure of the Nature of GenAI Use and Certification of Source Legitimacy

The next type of order also includes disclosures around GenAI use but goes farther than the first two categories listed above. Orders in this group require all litigants to first certify whether they used GenAI in the preparation of legal filings. If they did use such technologies, they must also certify that they checked authorities for accuracy from reliable sources. An example of this type of order is the one issued by Judge Brantley Starr of the Northern District of Texas, which provides:

> All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT or Harvey.AI) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being.[155]

Judge Starr's order also provides explanatory language regarding the purpose behind the order. The order notes that GenAI "platforms are incredibly powerful and have many uses in the law. . . . But legal briefing is not one of them. Here's why."[156] The platforms "are prone to hallucinations and bias."[157] With respect to hallucinations, Judge Starr notes that GenAI platforms "make stuff up—even quotes and

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[153] Standing Order for Civil Cases Before District Judge Araceli Martínez-Olguín at 5 (N.D. Cal. Nov. 22, 2023) (Judge Martínez-Olguín), https://www.cand.uscourts.gov/wp-content/uploads/2023/03/AMO-Civil-Standing-Order-11.22.2023-FINAL.pdf [https://perma.cc/B5BB-NLNE].

[154] Order on Artificial Intelligence (Ct. Int'l Trade June 8, 2023) (Judge Vaden), https://www.cit.uscourts.gov/sites/cit/files/Order%20on%20Artificial%20Intelligence.pdf [https://perma.cc/8WVK-4CD5].

[155] Mandatory Certification Regarding Generative Artificial Intelligence (N.D. Tex.) (Judge Starr), https://www.txnd.uscourts.gov/judge/judge-brantley-starr [https://perma.cc/V79T-U33K] (last visited July 30, 2024).

[156] *Id.*

[157] *Id.*

citations."[158] Concerning reliability and bias, "[w]hile attorneys swear an oath to set aside their personal prejudices, biases, and beliefs to faithfully uphold the law and represent their clients, generative artificial intelligence is the product of programming devised by humans who did not have to swear such an oath."[159] For these reasons, "these systems hold no allegiance to any client, the rule of law, or the laws and Constitution of the United States (or, as addressed above, the truth)."[160] For Judge Starr, these platforms are "[u]nbound by any sense of duty, honor, or justice," and "act according to computer code rather than conviction, based on programming rather than principle."[161]

Judge Starr's order offers the following remedy for those who may contest its conclusions: "Any party believing a platform has the requisite accuracy and reliability for legal briefing may move for leave and explain why."[162] Finally, the order notes that the court

> will strike any filing from a party who fails to file a certificate on the docket attesting that they have read the Court's judge-specific requirements and understand that they will be held responsible under Rule 11 for the contents of any filing that they sign and submit to the Court, regardless of whether generative artificial intelligence drafted any portion of that filing.[163]

4. Litigants Must Make Specific Disclosures and Certifications of Use of GenAI

The next type of order in this typology is represented by those issued by Judge Evelyn Padin of the District Court of New Jersey and Magistrate Judge Gabriel Fuentes of the Northern District of Illinois. Judge Padin's order provides:

> The use of any [GenAI] (e.g., OpenAI's ChatGPT or Google's Bard) for any court filings requires a mandatory disclosure/certification that: (1) identifies the [GenAI] program; (2) identifies the portion of the filing

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158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.*

163 *Id.* A similar order, including the explanatory language quoted above, has been issued by Judge Matthew J. Kacsmaryk of the Northern District of Texas. Mandatory Certification Regarding Generative Artificial Intelligence (N.D. Tex.) (Judge Kacsmaryk), https://www.txnd.uscourts.gov/judge/judge-matthew-kacsmaryk [https://perma.cc/NX2G-FLK3] (last visited Sept. 21, 2024).

> drafted by [GenAI]; and (3) certifies that the [GenAI] work product was diligently reviewed by a human being for accuracy and applicability.[164]

Similarly, Judge Fuentes's order offers guidance to and imposes the following obligations on litigants appearing before him:

> Any party using any [GenAI] tool to conduct legal research or to draft documents for filing with the Court must disclose in the filing that AI was used, with the disclosure including the specific AI tool and the manner in which it was used . . . . Parties should not assume that mere reliance on an AI tool will be presumed to constitute reasonable inquiry, because, to quote a phrase, "I'm sorry, Dave, I'm afraid I can't do that . . . . This mission is too important for me to allow you to jeopardize it."[165]

Judge Fuentes goes on to include in his order that "[o]ne way to jeopardize the mission of federal courts is to use an AI tool to generate legal research that includes 'bogus judicial decisions' cited for substantive propositions of law."[166]

In addition, Judge Fuentes's order provides:

> Just as the Court did before the advent of AI as a tool for legal research and drafting, the Court will continue to presume that the Rule 11 certification is a representation by filers, as living, breathing, thinking human beings, that they themselves have read and analyzed all cited authorities to ensure that such authorities actually exist and that the filings comply with Rule 11(b)(2).[167]

5. Disclosure of Use, Identification of Program Used, Certification of Authorities Checked for Accuracy, and Note that Lawyer Will Be Held Responsible for Filings

Several judges have followed the approach of United States District Judge Leslie E. Kobayashi of the District of Hawaii, whose standing order provides that litigants who use GenAI in preparing filings "must disclose in the document that AI was used and the

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[164] Judge Evelyn Padin's General Pretrial and Trial Procedures at 2 (D.N.J. Nov. 13, 2023) (Judge Padin), https://www.njd.uscourts.gov/sites/njd/files/EPProcedures.pdf [https://perma.cc/5W2L-LT4R].

[165] Standing Order for Civil Cases Before Magistrate Judge Fuentes at 2 (N.D. Ill. May 31, 2023) (Magistrate Judge Fuentes), https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_judges/Fuentes/Standing%20Order%20For%20Civil%20Cases%20Before%20Judge%20Fuentes%20rev%27d%205-31-23%20(002).pdf [https://perma.cc/BC2Y-GRTK] (quoting 2001: A SPACE ODYSSEY (Metro-Goldwyn-Mayer 1968)) (second ellipses in original).

[166] *Id.* at 2 (citation omitted).

[167] *Id.*

specific AI tool that was used."[168] In addition, they "must further certify in the document that the person has checked the accuracy of any portion of the document drafted by [genAI], including all citations and legal authority."[169] Judge Scott L. Palk of the Western District of Oklahoma and Magistrate Judge Jason A. Robertson of the Eastern District of that same state have issued orders practically identical to that of Judge Kobayashi.[170]

6. Prohibitions

While all of the orders listed above stop short of prohibiting lawyers and *pro se* litigants from using GenAI in research and preparation of court filings, at least some orders have gone so far as to do just that, and even more. Judge Michael J. Newman of the District Court for the Southern District of Ohio not only prohibits the use of GenAI tools in the production of court filings, but also imposes an affirmative duty on litigants to disclose when it appears to them that others have done so.[171] The federal court for the Eastern District of Missouri has issued an order banning *pro se* litigants from using GenAI in the preparation of any court filings as follows:

> No portion of any pleading, written motion, or other paper may be drafted by any form of generative artificial intelligence. By presenting to the Court (whether by signing, filing, submitting, or later advocating) a pleading,

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[168] Disclosure and Certification Requirements, Generative Artificial Intelligence at 1 (D. Haw.) (Judge Kobayashi), https://www.hid.uscourts.gov/cms/assets/95f11dcf-7411-42d2-9ac2-92b2424519f6/AI%20Guidelines%20LEK.pdf [https://perma.cc/4T2Z-8KVF] (last visited Oct. 12, 2024).

[169] *Id.*

[170] *See* Disclosure and Certification Requirements, Generative Artificial Intelligence at 1 (W.D. Okla.) (Judge Palk), https://www.okwd.uscourts.gov/wp-content/uploads/AI_Guidelines_JudgePalk.pdf [https://perma.cc/8N37-23D6] (last visited Oct. 12, 2024); Disclosure and Certification Requirements, Generative Artificial Intelligence at 1 (E.D. Okla.) (Magistrate Judge Robertson), https://www.oked.uscourts.gov/sites/oked/files/AI%20Guidelines%20JAR%209.27.23.pdf [https://perma.cc/RG8U-FZ8V] (last visited Oct. 12, 2024).

[171] Standing Order Governing Civil Cases at 11 (S.D. Ohio Dec. 18, 2023) (Judge Newman), https://www.ohsd.uscourts.gov/sites/ohsd/files//MJN%20Standing%20Civil%20Order%20eff.%2012.18.23.pdf [https://perma.cc/6UXY-SA9Y].

> written motion, or other paper, self-represented parties and attorneys acknowledge they will be held responsible for its contents.[172]

This overview of a range of federal court orders on the use of GenAI in litigation shows that courts have deployed a multitude of tactics for dealing with one main risk: that GenAI will be abused in ways that impact the integrity of the litigation process. This array of responses strongly aligns with New Governance approaches to regulatory oversight generally. In examining one court system's decision to reject the issuance of a rule regarding GenAI, another aspect of the adoption of these rules invokes New Governance models: stakeholder engagement.

7. The Fifth Circuit's Effort to Issue a Rule Regarding GenAI

This Section describes the Fifth Circuit's efforts to amend its appellate practice rules in light of new technologies, the stiff resistance the Circuit encountered from the practice bar, and its ultimate retreat from the amended rule. In November 2023, the Fifth Circuit requested comments on proposed changes to a court rule as well as a form used by litigants before that court.[173] As part of the certification with respect to matters like word limits and other formal rules for appellate filings,[174] the Fifth Circuit proposed adding that both "counsel and unrepresented filers" would have to "further certify that no [GenAI] program was used in drafting the document presented for filing." Additionally, if such a program was used, further certification should show that "all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human."[175] The Fifth Circuit solicited comments on the proposed rule change.[176]

One commentator argued that the rule change was unnecessary:

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[172] *Self-Represented Litigants*, U.S. DIST. CT.: E. DIST. OF MO., https://www.moed.uscourts.gov/self-represented-litigants-srl [https://perma.cc/6JPP-KVSQ] (last visited Jan. 22, 2024). The court also references Rule 11 of the Federal Rules of Civil Procedure at the end of its directive. *Id.*

[173] *See* Notice of Proposed Amendment to Fifth Cir. R. 32.3 at 1–2 (5th Cir. 2023), https://www.ca5.uscourts.gov/docs/default-source/default-document-library/public-comment-local-rule-32-3-and-form-6 [https://perma.cc/8UPY-ZKYD] (last visited Oct. 12, 2024).

[174] Form 6, Appendix of Forms to the Fed. R. App. P.

[175] Notice of Proposed Amendment to Fifth Cir. R. 32.3, *supra* note 173, at 1.

[176] *Id.* (demonstrating notice was issued November 27, 2023, and comments were sought by January 4, 2024).

> Court rules singling out the supposed unique dangers of "AI", are not necessary and bound to become relics. If everything of [sic] similar level of intrinsic, unique importance (i.e., low) had to be included in a certificate to a brief, the certificates would soon be longer than the briefs themselves. "AI-focused court rules", like Cabbage Patch Kids, pet rocks, and fidget spinners, are a passing fad that may bring us some amusement but add nothing to substance.[177]

Another commentator was not opposed to the rule change, but felt the language reviewed "by a human" was not "strict enough," arguing further that

> the minimum standard of care for a competent, reasonably prudent lawyer would allow any "human" to confirm his or her cites and the propositions espoused in a brief that is utilizes [sic]. Even setting aside lazy, hallucinating AI citations, this is an inappropriate standard for review of any cites. It would be problematic if such a rule became the "standard of care."[178]

Another commentator pointed out the problem of inappropriate citations was not limited to those litigants who mistakenly might rely on the information produced by GenAI:

> The advent of [GenAI] exposed, but did not cause the problem of inaccurate citations in court filings long known to experienced practitioners. To the extent that pervasive miscitation remains a concern, the proposed rule should require lawyers to certify that a human verified the accuracy of all research and arguments contained in filings, and not just those generated by AI.[179]

Based on the responses received by various stakeholders, the Fifth Circuit ultimately decided against adopting the special rule for the use of GenAI in litigation.[180] Instead, the circuit court issued a different order, concluding that "having considered the proposed rule, the accompanying comments, and the use of artificial intelligence in the legal practice, [the court] has decided not to adopt a special rule

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[177] Email from Brian King to Margaret Dufour (Nov. 29, 2023, 9:21 AM) (emphasis omitted), *reprinted in Comments on Proposed Rule Change to Fifth Circuit Rule 32.3 and Form 6*, https://www.reuters.com/legal/transactional/lawyers-voice-opposition-5th-circuits-proposed-ai-rule-2024-01-29/ [https://perma.cc/XND9-94FZ] (follow "letters made public" hyperlink).

[178] Letter from Lance L. Stevens, Stevens Law Group, to Lyle W. Cayee, Clerk of Court, U.S. Court of Appeals for the Fifth Circuit (Dec. 5, 2023), *reprinted in Comments*, *supra* note 177.

[179] *Id.* at 2.

[180] Court Decision on Proposed Rule, at 1 (5th Cir. 2024), https://www.ca5.uscourts.gov/docs/default-source/default-document-library/court-decision-on-proposed-rule.pdf?sfvrsn=5967c92d_2 [https://perma.cc/9TZM-A7CR].

regarding the use of artificial intelligence in drafting briefs at this time."[181] That order also provided that "[p]arties and counsel are reminded of their duties regarding their filings before the court under Federal Rule of Appellate Procedure 6(b)(1)(B)," and "are responsible for ensuring that their filings with the court, including briefs, shall be carefully checked for truthfulness and accuracy as the rules already require."[182] The order closed with the following admonition: " 'I used AI' will not be an excuse for an otherwise sanctionable offense."[183] The Fifth Circuit's process and ultimate decision regarding the use of GenAI shows that, through stakeholder engagement, regulators (that is, the court here) considered but then rejected the adoption of a rule regarding the use of such technology. This reveals the reliance of the court on an approach common in, and preferred by, New Governance models.

D. New Governance Features of Ex Ante *Rules Regarding GenAI*

The previous Section shows that the efforts by judges and court systems to rein in improper GenAI use in the context of federal civil litigation have exhibited several of the key features of New Governance models. There has been at least some stakeholder engagement in the development (or rejection) of rules regarding GenAI use. The Fifth Circuit's effort to develop a rule to cover the improper use of GenAI was met with stiff opposition. Considering that resistance, the court chose not to implement any rule. But in court systems that do implement rules moving forward, those rules are likely to result from the work of committees consisting of practitioners and academics—or simply from courts fielding feedback from practitioners, as the Fifth Circuit did when it proposed, and ultimately rejected, a circuit-wide rule on GenAI.[184] In addition, at least one judge has invited litigants to offer any evidence they might have that suggests his approach to regulating GenAI is off the mark.[185] It would come as no surprise to learn that other court systems are currently considering

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[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] Mandatory Certification Regarding Generative Artificial Intelligence, *supra* note 155.

amendments to their local rules, and such debates are happening in settings where various stakeholders can provide input to the courts.

The mere fact that different court systems and judges have begun to experiment—by promulgating the rules and standing orders described in the previous Part—reveals other aspects of this process reflecting elements of New Governance approaches. These phenomena suggest that the development of these local rules and standards related to GenAI are both experimental and decentralized, with some courts and even individual judges issuing their own rules of practice by litigants before them.

On one level, this may create a patchwork quilt of rules that vary from judge to judge. But it also means that this array of rules can generate feedback in real-time from the practices of litigants. Courts can learn whether some approaches—softer, disclosure-based rules, as opposed to prohibitions, for example—might work better than others. This combination of experimentation, differentiation, and decentralization can create feedback loops, leading to a myriad of regional regulations. But this could also lead to well-informed, higher-level regulation, like the adoption of new rules that govern all federal courts. Additionally, these feedback loops may generate interest in and information for state court systems seeking to experiment with similar rules that might serve them well.

Another critical feature of the current array of rules and standing orders is that they are largely based on soft-law models. They rely on things like warnings about the risks of the use of GenAI in the preparation of legal filings, disclosures about the use of these new technologies—which likely leads litigants to "think twice" before using them without care—and self-certifications of compliance (meaning there is a degree of self-regulation in these models). At least one standing order that prohibits the use of these new tools in the preparation of legal files also imposes an affirmative duty on litigants to report when it appears that other litigants have violated that prohibition.[186] This draws elements from New Governance approaches that encourage the incorporation of whistleblower

[186] Standing Order, *supra* note 165.

protections into regulatory systems.[187] Admittedly, this is more of a whistleblower mandate. It remains to be seen whether Judge Newman will punish a lawyer for failing to comply with such a reporting mandate.

Finally, the array of rules and standing orders rely mostly on soft-law approaches, like warnings and self-certification (which is a form of self-regulation). At the same time, it is important to note that these so-called soft-law protections are always backstopped by robust punishments—after the fact—for lawyers and *pro se* litigants who fail to comply with the terms of these *ex ante* rules.

Given the ongoing development and proliferation of individual rules, it is still too early to determine whether the current regulatory regime for overseeing the use of GenAI in civil litigation is achieving its intended effects. After several high-profile instances where the technology appears to have been used with significant adverse consequences, there have been few similar cases since. It does appear that those jurisdictions and courtrooms operating under the orders described here have not had litigants present filings tainted by GenAI hallucinations.

Whether judicial interest in these issues and the actions of the judges and court systems described above have chilled such improper conduct is difficult to determine. Given that the percentage of cases covered by these sorts of rules when compared to the entirety of the federal court system's caseload is relatively small, it is impossible to determine whether that is a mere coincidence or a causative effect. Nevertheless, the attention of these judges and court systems to these matters has quite possibly led at least some litigants to think twice before utilizing GenAI without care. Still, the fact that some attention to these matters, and the high-profile examples of lawyers who have improperly used the technology and faced sanctions for such use, has likely led many practitioners to take some care before they use GenAI tools and rely on the work product they generate. Additional data from these courts, and the courts where no new rules apply, could lead more court systems and judges to institute similar orders. More importantly,

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[187] For a discussion of the value of whistleblowers in the context of New Governance regulatory approaches, see Orly Lobel, *Lawyering Loyalties: Speech Rights and Duties Within Twenty-First-Century New Governance*, 77 FORDHAM L. REV. 1245, 1249–67 (2009).

it could also help inform efforts to determine whether to change the Federal Rules of Civil Procedure as a whole to incorporate some cautions, or even prohibitions, on GenAI.

IV. HOW THE EXPERIENCE OF REGULATING GENAI IN THE COURTS CAN INFORM EFFORTS TO REGULATE NEW TECHNOLOGIES

Out of necessity, judges have found themselves having to grapple with issues of "regulating" the use of GenAI. While existing tools enable courts to punish those who misuse this technology after the fact, some courts and judges have attempted to impose *ex ante* rules designed to prevent such misuse before it even occurs. In so doing, the range of interventions they have implemented bears the hallmarks of New Governance regulatory approaches. As lawmakers, regulators, industry, and consumers explore ways to ensure GenAI is used safely, effectively, and securely, can GenAI regulation in general be informed by these judges' New Governance efforts?[188] This Part briefly explores how jurists' approaches to regulating GenAI might translate into broader interventions addressing two other major threats posed by this technology: consumer privacy and use of intellectual property by LLMs. This Part is, of course, tentative, exploratory, and speculative. It is also highly procedural: It intentionally discusses largely process-oriented efforts as opposed to substantive prohibitions. This is because efforts to regulate artificial intelligence will necessarily face a highly dynamic field where technological developments can quickly overcome efforts to regulate them.[189] For those reasons, structural, adaptable, and procedural measures are much more useful at this stage in the evolution of artificial intelligence.

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[188] Some of the threats posed by unchecked artificial intelligence are spelled out in the Biden Administration's Executive Order on artificial intelligence include violations of consumer privacy, national security risks, and algorithmic discrimination, and trustworthiness. *See generally* Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Nov. 1, 2023).

[189] Jonas J. Monast, *Emerging Technology Governance in the Shadow of the Major Questions Doctrine*, 24 N.C. J.L. & TECH. 1, 4 (2023) (noting that a "common challenge[] with emerging technology governance" is designing a regulatory system "flexible enough to keep pace with changing technologies").

A. Stakeholder Engagement

First and foremost, any effort to regulate GenAI should start with broad stakeholder engagement. Such engagement should include regulators and lawmakers; the entities creating these applications; content creators like media outlets, artists, and writers whose content is being used to train the artificial intelligence; non-profit organizations engaged in consumer protection efforts; and consumers who are likely to use these services—and whose private information might be used to train LLMs. This kind of stakeholder engagement must go beyond the occasional congressional hearing where a few leaders of technology companies come before lawmakers and express their willingness to work toward safety and security, which brings no progress on any meaningful legal or regulatory interventions.

B. Diffused and Decentralized Regulators

It is clear that there is no overarching rule related to the use of GenAI in the federal court system. All of the efforts described here are the product of diffused and decentralized decision-making, a hallmark of New Governance approaches. While the experimentation occurring at the local level might one day catalyze change with the Federal Rules of Civil Procedure, individual judges and select court systems have chosen to issue an array of different standing orders and rules that address the use of GenAI in the courts. The overwhelming majority of judges who make up the federal judiciary have not issued standing orders related to GenAI. By extension, the overwhelming majority of litigants with matters before the federal judiciary are doing so without any special guidance regarding the use of GenAI in their court filings.

Whether litigant behavior will change in light of the existence of these orders remains to be seen. For the time being, it appears that many litigants have taken the experience of the lawyers in *Mata v. Avianca* to heart since only a few courts appear to have faced instances where litigants clearly used GenAI. It remains to be seen whether that will continue to be the case and whether jurists with explicit orders regarding GenAI end up with fewer problematic filings than those jurists with no such orders. If that is the case, it will lend credence to the argument that these orders help reduce such filings; if not, this will be evidence that no orders are necessary in light of existing tools. The outcomes that emerge from this decentralized experimentation will

inform reformation efforts at the national level—or suggest that no such reform is necessary.

C. Soft-Law: Self-Regulation, Rules over Standards, and Self-Certification

There is a clear need to regulate the activities of technology companies developing the GenAI models described in this Article. Yet, GenAI models are being developed so rapidly that the promulgation of meaningful and detailed legislation and regulations might be difficult. Any laws put forth the risk of stifling innovation or, as is more likely, getting outpaced by it. A standards-based approach, as opposed to hard-and-fast top-down rules, seems to be an appropriate approach in this space, and such standards would cover things like consumer privacy and the protection of content creators' intellectual property.[190] Moreover, the first step of such protections could be self-certification, or certification by an independent and private entity, where the application developers adhere to a range of critical standards in the creation of GenAI-based products.[191]

D. Disclosure Backed by Liability Rules

Another element of New Governance approaches is that they tend to favor disclosure-based regimes in contrast to more heavy-handed regulation.[192] Should such an approach apply to this context, it should not be a weak form of disclosure, such as one that a company buries in a lengthy terms of service agreement. Rather, the disclosure should be understandable, including clear explanations of the entity's practices with respect to critical elements of the overall system for regulating

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[190] Nicol Turner Lee et al., *Around the Halls: What Should the Regulation of Generative AI Look Like?* BROOKINGS INST. (June 2, 2023) (describing the range of topics regulation of generative AI should cover, including privacy and intellectual property), https://www.brookings.edu/articles/around-the-halls-what-should-the-regulation-of-generative-ai-look-like/ [https://perma.cc/329D-5MGH].

[191] New Governance literature does not support purely private certification serves as an effective regulatory tool. *See* Orly Lobel, *Setting the Agenda for New Governance Research*, 89 MINN. L. REV. 498, 508 (2004).

[192] *See* Jebe, *supra* note 94, at 247–64 (describing disclosure-based regimes in New Governance Theory).

GenAI applications.[193] It should also include liability for failure to abide by the disclosure regime.

E. Robust Whistleblower Protections

Companies developing GenAI applications will claim that their algorithms and other tools used in product development are trade secrets that need not be revealed to regulators, consumers, or competitors. One of the best ways to monitor whether these developers are adhering to a GenAI oversight regime would be to ensure that individuals working within such companies have strong whistleblower protections.[194] The price of offering such companies a degree of running room to develop their products in a looser, more standards-based approach is that those with inside information should be able to come forward to report misconduct without fear of retaliation.

V. CONCLUSION

Far ahead of policymakers, legislators, and regulators, courts have been thrust at the forefront of efforts to explore effective ways to oversee GenAI use. While most federal judges have utilized *ex post* punishments for improper GenAI use, some have explored ways to develop *ex ante* rules that may prove effective in deterring disfavored conduct before it happens. Many of these efforts reflect the hallmarks of New Governance Theory. Admittedly, it is too early to tell whether these interventions will prevent GenAI misuse in the courts more effectively than their counterparts: more traditional, after-the-fact punishments. Regardless, these innovations reflect an organic, decentralized, standards-based approach to regulating GenAI that might prove fruitful in both this context and others. When regulators consider ways to rein in disfavored conduct involving GenAI, they can be guided by these judicial efforts that bear New Governance Theory's hallmarks.

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[193] On effective approaches in disclosure-based regimes, see Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 579–95 (2014).

[194] *See* Lobel, *supra* note 187, at 1250–67 (describing value of whistleblower protection in legal regimes).