INSTITUTE FOR JUSTICE

January 3, 2024

Clerk of Court
U.S. Court of Appeals for the Fifth Circuit
ATTN: Rule Changes
600 South Maestri Place
New Orleans, LA 70130

Re: Comment in Response to Notice of Proposed Amendment to 5th Cir. R. 32.3.

Mr. Cayce:

The Institute for Justice ("IJ") submits these comments in response to the Fifth Circuit's recently proposed change to Fifth Circuit Rule 32.3, in which your office proposes a modification that would require a new affirmation by filers regarding the use of "generative artificial intelligence program[s]." IJ is a national public-interest law firm with a regular practice before the Fifth Circuit on various matters of constitutional law. Employing over 40 attorneys nationwide, IJ is headquartered in Arlington, Virginia, with state offices in several U.S. cities, including Austin, Texas.

This Court's attention to the use of generative AI in the practice of law is sensible and timely. Despite the recognized potential for generative AI technology to "dramatically increase access to key information for lawyers and non-lawyers alike,"[1] well-publicized events involving the misuse of this technology by attorneys show that it is not without risks.

IJ is opposed, however, to the proposed disclosure as currently drafted. IJ is particularly concerned that the proposed rule, if adopted by this Court, will discourage uses of generative AI that could benefit this Court and the public, especially by improving the quality of legal writing. At the same time, the proposed rule is imprecisely tailored to address the legitimate concerns that motivated it—particularly the overriding concern that generative AI may "hallucinate" citations to non-existent legal authorities or misrepresent genuine legal authorities.

In short, IJ's primary concern with the proposed rule is that it treats all uses of generative AI as equivalent and equivalently worthy of disclosure. But consider two legal practitioners. The first opens the popular generative AI platform ChatGPT and gives it the prompt, "Draft a motion to dismiss in response to a suit for wrongful termination under Title VII." The second has already written a motion to dismiss but, struggling with

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one of the sections, pastes it into ChatGPT with the prompt, "Suggest ways to make this section clearer and more concise, without changing its meaning."

Most judges would agree that the first practitioner—who has outsourced research, reasoning, and drafting to a computer program—is playing with fire. But most judges would probably also agree that the second practitioner hasn't done anything nearly as dangerous. And if the second practitioner's use of ChatGPT results in a filing that is clearer and easier to read, most judges would appreciate the final result and want to encourage other lawyers to do the same.

Under the proposed rule, however, the responsible second practitioner may fear that disclosing his use of generative AI may cause the Court to confuse him with the irresponsible first practitioner, and that the Court may approach his filing with more skepticism than it otherwise might. That puts him in a difficult position. He may forgo using generative AI to improve the quality of his writing, which does no favors to this Court or his client. Or he may be tempted to falsely claim that he did not use AI, banking on the fact that using AI to improve prose in this fashion is essentially impossible to detect. In either case, the proposed rule has not addressed the Court's primary concern that generative AI may "hallucinate" or misrepresent legal authorities.

Thus, if this Court should adopt any disclosure rule at all, IJ suggests that it be tailored to address that legitimate concern while not discouraging other, more benign uses of this emerging technology. As written, the proposed rule is unlikely to accomplish either goal. As explained below, the proposed rule is broader than necessary, fails to reflect how generative AI is likely to be used among teams of lawyers, and is vague as to what technology it covers. It is also largely redundant of existing federal rules that already provide federal courts with tools to sanction the irresponsible use of generative AI.

First, the scope of the proposed rule is broader than necessary because its current two-prong approach requires filers to affirmatively disclose the use of generative AI. But, as shown above, this Court's primary concern with generative AI is not its mere use. Instead, it is the potential of generative AI either to hallucinate non-existent legal authorities or to misrepresent genuine legal authorities. To address that more precise concern, it is enough to require a filer to certify that *if* "a generative artificial intelligence program was used in the drafting of this document[,] . . . all generated text, including all citations and legal analysis, has been reviewed for accuracy and approved by a human." This narrower affirmation addresses the Court's concerns without outing the filer as having used generative AI.

Second, the proposed rule fails to reflect the reality of how generative AI is likely to be employed among teams of lawyers working on the same case. Westlaw, for example, has just updated its "Westlaw Precision" product to include an "AI-Assisted Research" feature, which it touts as a new way for practitioners to "harness the power of generative AI—grounded in Westlaw's trusted content—to quickly get relevant answers to your

legal research questions."[2] Users can pose a question in natural language—such as "What equitable doctrines may prevent a party from changing its position during litigation?"—and Westlaw provides an answer written using generative AI with links to relevant legal citations. It is easy to imagine that some of this AI-generated text will appear in legal research memos written by one attorney that will then be relied upon by another attorney at the same firm when writing a legal brief. As a result, that second attorney may submit a brief containing AI-generated text without knowing it. Indeed, AI may be particularly useful for basic propositions such as the most common articulation of a legal standard or a list of factors. Short of law firms imposing cumbersome internal disclosure requirements for tracking the use of AI-generated text in internal memos, it is hard to see how those lawyers could comply with the proposed rule. And assuming they have confirmed the accuracy of the citations and legal arguments, it is hard to see why this Court would care that this accurate text was composed, in part, by a computer.

Third, the proposed rule is vague regarding the meaning of "generative artificial intelligence." Some uses of generative AI will be obvious to a filer. But as generative AI technology continues to advance, it will increasingly be incorporated into the tools practitioners use for both legal research and legal drafting. Thus, it is not only a virtual certainty that most practitioners will adopt its use in some way, but that some of those practitioners will do so unknowingly. As another example, many attorneys, including the undersigned, deploy a popular Microsoft Word app called "BriefCatch," which scans legal writing for jargon, legalese, and convoluted wording. The app suggests various changes and the result, almost invariably, is clearer, cleaner writing. According to a recent press release, the company that produces BriefCatch is working to incorporate AI into future versions of the product.[3] But if this future product suggests replacing the wordy phrase "notwithstanding the fact that" with the shorter and cleaner "even though," is this a use of generative AI that must be disclosed? Because the proposed rule is unclear on this point, this vagueness is likely to result in some practitioners inadvertently failing to disclose their use of AI or steering clear of these useful products to play it safe. For others, this vagueness may also lead to prophylactic over-disclosure, leaving the court with no certainty as to how or to what extent a practitioner used generative AI (or if they truly used it at all).

Finally, the proposed rule is largely redundant of tools already at this Court's disposal for regulating unethical or irresponsible practice. Every filer in federal district court is bound by Federal Rule of Civil Procedure 11(b)(2), which signals—for any legal pleading and without any extra certification—that the signatory affirms that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law."[4] The federal circuit courts, under the Federal Rules of Appellate Procedure, have similar powers. The courts may, under Rule 46(c), "discipline an attorney . . . for conduct unbecoming a member of the bar or for failure to comply with any court rule" or, under Rule 38, impose damages and costs for a "frivolous" appeal. Accordingly, to the extent the court is concerned mainly with generative AI's potential to hallucinate case law or

legal argument, the existing rules' basic professionalism requirements, on pain of sanctions, already prohibit the irresponsible use of the technology. And they do so without requiring any extra certifications by practitioners.

For these reasons, IJ suggests that this Court reject the proposed rule. Practitioners are already under a professional obligation—which this Court possesses the inherent authority to enforce—to provide accurate and fully vetted arguments and citations in their briefing. If another certification is to be required, however, IJ recommends a narrower affirmation, requiring only that filers state they have confirmed the accuracy of any AI generated text or citations. This sort of affirmation would adequately serve this Court's interests without inadvertently discouraging adoption of this promising technology.

Respectfully submitted,
/s/ Paul Sherman
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