WORKING GROUP ON JUDICIAL ADMINISTRATION
AND ARTIFICIAL INTELLIGENCE

# ARTIFICIAL INTELLIGENCE AND THE NEW YORK STATE JUDICIARY: A PRELIMINARY PATH

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# I. INTRODUCTION

The Working Group on Judicial Administration and Artificial Intelligence (JAAI) - a joint effort by the New York City Bar Association's Council on Judicial Administration and Task Force on Digital Technologies - was tasked with addressing the potential impact of artificial intelligence ("AI") on the New York State judiciary. This group was formed in May 2023 in light of the wide-ranging and rapid pace of AI adoption, including within the broader legal system.[1] This report includes a summary of certain key issues that the Working Group believes are important for the judiciary to consider in the near-term, as well as certain recommendations based on the current state of AI development.

Overall, the Working Group has concluded that it is urgent for the judiciary to focus on these issues in earnest, especially given that practitioners are already exploring how AI might facilitate their advocacy efforts. Notably, the judiciary has already started this process by creating the Advisory Committee on Artificial Intelligence and the Courts. As Chief Justice John Roberts noted in his 2023 Year-End Report on the federal judiciary, "I predict that judicial work – particularly at the trial level – will be significantly affected by AI."[2] The Working Group expects that in the near-term, practitioners will become increasingly reliant on AI for functions such as legal research, text generation, document production, and legal analysis, especially as legal technology vendors expand their AI product offerings, and as firms develop their own AI capabilities. In addition, we expect that an increasing number of AI tools will become available to courts, and thoughtful analysis of whether to adopt these tools will be critical. Courts that do not study and understand AI technology will be at a disadvantage, relative both to other institutions and to attorneys appearing before them. As a result, courts could be placed in the difficult position of needing to constantly play catch-up as this technology evolves.

In addition, AI could help address certain challenges the New York State judiciary is facing, from high case volumes to labor shortages.[3] AI may also offer numerous benefits, including increasing access to justice, improving the speed with which cases are resolved, and generally enhancing the efficient operation of the judiciary. This is not to say that AI should be adopted by the New York State judiciary wherever possible. AI also presents significant risks, some of which are still unknown. The key takeaway from this report is that judges and court staff in this state need to become knowledgeable in the near-term about AI and its uses so that they can make meaningful and educated decisions about AI use.

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[1] Additional information about the Working Group, and a Selected Bibliography, can be found in Appendix A. Separately, a chart of how court systems within other U.S. states are using AI can be found in Appendix B.

[2] CHIEF JUSTICE JOHN G. ROBERTS, JR., 2023 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (Dec. 31, 2023), https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf. (All websites last accessed May 28, 2024.)

[3] *See, e.g.*, N.Y. STATE UNIFIED COURT SYS., 2023 ANNUAL REPORT 3, https://www.nycourts.gov/legacyPDFS/23-Annual-Report.pdf (message from the Executive Director of the New York State Office of Court Administration) (stating that the New York court system "is among the largest, busiest, and most complex" court systems in the country).

## II. DEFINING ARTIFICIAL INTELLIGENCE

The definitions for "artificial intelligence" and "generative artificial intelligence" are not settled. "Artificial intelligence" is commonly understood to mean "the capability of computer systems or algorithms to imitate intelligent human behavior."[4] Federal law uses a more nuanced definition: "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action."[5]

Separately, "generative artificial intelligence" is commonly understood to mean "artificial intelligence . . .that is capable of generating new content (such as images or text) in response to a submitted prompt (such as a query) by learning from a large reference database of examples."[6] President Biden's October 2023 executive order defines the term as follows: "[T]he class of AI models that emulate the structure and characteristics of input data in order to generate derived synthetic content," which "can include images, videos, audio, text, and other digital content."[7] While generative AI has garnered most media attention, it is important to appreciate that AI has a myriad of uses beyond simply generating content, including the ability to analyze and synthesize data and information and improve workflows.

An explanation of how AI models are developed and function is beyond the scope of this report, but resource materials on AI technology are included at Appendix A.

## III. JUDICIAL USE OF AI

Judges, law clerks, court attorneys and other judicial staff might use AI in connection with executing their roles and responsibilities. We set forth in this section some key areas where AI could be an important tool for courts, and outline some specific issues for consideration.

As a threshold matter, the Working Group believes that if judges use an AI tool, they should do so only if (1) the tool accesses and relies on a closed and approved data set (e.g., the text of case law, statutes, and rules), (2) the tool includes citations that judges can verify, and (3) the tool is designed such that third parties cannot access the prompts and searches used by judges or their staff, or use them for other purposes including to further train an AI model. The first two guardrails are meant to protect against the significant risk of "hallucinations," (i.e., text or results that an AI program presents as fact, but which is, in fact, false), such as a court decision that is fabricated, or

[4] Artificial intelligence, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/artificial%20intelligence.

[5] 15 U.S.C. § 9401(3) (2024).

[6] Generative AI, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/generative%20AI.

[7] Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, 88 Fed. Reg. 75191, 75195 (Oct. 30, 2023).

an inaccurate summary of an actual decision.[8] The third guardrail is critical to protecting the privacy and confidentiality of a court's deliberations and processes.

A. *Text Generation and Legal Research*

As AI further develops, judges and their staff may look to AI as a tool to generate text, including as a first draft of all or part of opinions, or to conduct more robust and sophisticated legal research. While such usage could save courts significant time, the Working Group cautions that, for the foreseeable future, any such usage would require significant human involvement to check the accuracy of the text, as well as any cases that are cited. In addition, those using an AI tool in this manner would need to have significant training in "prompt engineering" so that the prompts they enter generate accurate and relevant text and citations.[9] As judges explore the use of AI to generate text, they should consider whether such usage is influencing in unintended ways how they might rule on an issue, and whether an over-reliance on AI might reduce the amount of original judicial drafting that for generations has been the hallmark of establishing new legal concepts. Nonetheless, the Working Group believes that over time with appropriate guardrails in place, the use of AI by the judiciary to generate text and conduct legal research can yield important efficiencies.[10]

B. *Document Summaries and Analysis*

Courts might benefit from advances in AI by using tools to summarize or analyze materials that have been submitted to them. This might include, for example, generating summaries and comparisons of the litigants' respective positions; generating questions the judge might ask at a hearing based on materials that have been submitted; and revealing inconsistencies in a party's position that the court may not have appreciated on its own. The Working Group believes that any such use will require appropriate human intervention to check for accuracy, and to ensure that courts do not become over-reliant on these tools when framing questions.

C. *Case Management Conferences*

Conducting initial case management conferences varies widely across the New York State court system. The Working Group considered whether to recommend that, for those courts that conduct initial case management conferences, current best practices should include a discussion

[8] *See, e.g.*, Matthew Dahl et al., *Hallucinating Law: Legal Mistakes with Large Language Models Are Pervasive*, STANFORD UNIV. (Jan. 11, 2024), https://hai.stanford.edu/news/hallucinating-law-legal-mistakes-large-language-models-are-pervasive; *see also Mata v. Avianca, Inc.*, No. 22-cv-1461-PKC, 2023 WL 4114965 (S.D.N.Y. June 22, 2023) (sanctioning lawyer for failing to check citations generated from an AI tool).

[9] *What Is Prompt Engineering?*, AMAZON WEB SERVS., https://aws.amazon.com/what-is/prompt-engineering/ ("Prompt engineering is the process where you guide generative artificial intelligence (generative AI) solutions to generate desired outputs. Even though generative AI attempts to mimic humans, it requires detailed instructions to create high-quality and relevant output. In prompt engineering, you choose the most appropriate formats, phrases, words, and symbols that guide the AI to interact with your users more meaningfully. Prompt engineers use creativity plus trial and error to create a collection of input texts, so an application's generative AI works as expected.").

[10] It is beyond the scope of this report to consider the specific issue of whether there should be at least a best practice (or perhaps even some requirement) to cite to the actual AI platform or model that has generated text used by a judge or a lawyer.

of whether and how the parties plan to use AI in the case. The Working Group believes that generative AI will likely be used in relatively few cases in the near future in a way that it would need to be discussed at an initial conference. Furthermore, there is considerable training of judges as well as lawyers that is needed before there can be meaningful discussions about this subject. Thus, the Working Group believes that the use of AI in litigation today is not yet at the point where there should be a recommended best practice that it be discussed at all initial case management conferences. However, the issue should be monitored closely given the pace of AI adoption and use by lawyers, and the number of tools that will become available to the legal profession. Discussions of AI usage could well become a mainstay of initial case management conferences in the not-too-distant future. We do, however, recommend that AI-related issues should be raised during the final pre-trial conference because, by that time, any proposed use of AI will be concrete and capable of being discussed in detail. Given the fact that there are many judges and lawyers who are not familiar with AI technology, or with the legal issues that might me implicated by AI, there is too great a risk of disrupting the trial if AI issues are addressed for the first time as they come up in the middle of a trial.

D. *Decision-making*

A key question when assessing potential use cases for AI in the judicial system is whether this technology can be used to support or enhance decision-making. The Working Group advises that any such use be given careful consideration, including through empirical studies, given a variety of risks that this new technology might present.

Potential risks presented by using AI in decision-making include the following:

- AI may have been developed using biased data or programming, thereby yielding results that could harm parties.
- AI's "black box" nature can make it hard to explain how AI reaches its conclusion, which can undermine accountability and transparency.
- AI might ignore "human" factors, like ethical considerations and flexibility, thereby enabling undesired outcomes.
- AI could cause judges to suppress their own independent judgment if they become overly reliant on AI.
- Judges are statutorily and constitutionally required to decide cases. A judge who essentially outsources that task to an AI program raises the question of whether that duty is being fulfilled.
- AI tools could be compromised by cyberattacks or other malicious actions, thereby compromising the reliability of those tools.

Potential benefits presented by using AI in decision-making include the following:

- AI may reduce the risk of human bias in decision-making by identifying bias patterns of which courts may not be aware.

- AI might yield more consistent decision-making through consistent interpretations of the law and precedents.

- AI may help resolve cases more efficiently.

As courts go forward in assessing whether AI has a role in judicial decision-making, they should take into account the types of cases for which such use may be inappropriate, regardless of how the technology advances. For example, it is possible that AI-enhanced decision-making will never be appropriate in areas such as criminal law and family law.[11]

The judiciary will also need to determine whether courts will be required to disclose their use of AI for decision-making. The Working Group believes that a disclosure requirement has a number of important benefits, including: it would help ensure judges are accountable for their use of AI; it would help the parties and the public better understand how the judiciary is using AI and to raise concerns if a judge appears to use an AI tool inappropriately; and it would assist with appellate review of a lower court's decision. However, the Working Group appreciates that the use of AI by a court in connection with decision-making can take many different forms, and the point at which it is being used to render a decision may not always be clear. A careful and considerate analysis by the judiciary of any disclosure requirement will therefore be critical. However, in the immediate term, given the known risks with current AI platforms, the Working Group recommends that serious consideration be given to whether judicial ethics rules should be amended to require judges to disclose their use of AI in decision-making.[12]

## IV. USING AI AS A FORM OF MEDIATION

Perhaps the most transformative use of AI in the judicial process would be an AI program that could decide cases correctly and fairly in accordance with the law but without the need for human intervention. While the Chief Justice of the United States Supreme Court recently stated that "human judges will be around for a while,"[13] AI could play an important role in mediating or even deciding smaller disputes between parties in certain circumstances.

The idea of using AI as a form of automated decision-making can build on current uses of online dispute resolution ("ODR").[14] For example, ODR has been used for years by private

[11] *See also* Richard M. Re & Alicia Solow-Niederman, *Developing Artificially Intelligence Justice*, 22 STAN. TECH. L. REV. 242 (2019), https://law.stanford.edu/wp-content/uploads/2019/08/Re-Solow-Niederman_20190808.pdf.

[12] N.Y. COMP. CODES R. & REGS. tit. 22, §§ 100.0-.8 (2024).

[13] CHIEF JUSTICE JOHN G. ROBERTS, JR., 2023 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (DEC. 31, 2023), https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf.

[14] *See also* JAMES BAKER ET AL., CTR. FOR SECURITY & EMERGING TECH., AI FOR JUDGES 35, https://www.armfor.uscourts.gov/ConfHandout/2022ConfHandout/Baker2021DecCenterForSecurityAndEmergingTechnology1.pdf ("[I]n-the-loop describes humans in functional control of an application, deciding when and how it is specifically used. On-the-loop describes humans observing AI, but not controlling the AI, but with the option to do so. Out-of-the-loop describes an autonomous system operating automatically.").

companies, such as eBay, which includes an algorithm that suggests a mediated settlement and, in 2018, reported a 90% success rate.[15]

The Working Group proposes that the state judiciary's Division of Alternative Dispute Resolution explores working with existing ODR providers to pilot an AI-enabled ODR program that could suggest mediator-type solutions.[16] This court-run pilot program should first focus on high-volume, low-stakes types of cases, and be offered on an opt-in basis. Indeed, until such time that the system has demonstrated a track record of success, parties should be given the right to reject the suggested resolution of the AI mediator and to opt back in to court adjudication. This would be no different from parties electing, in some cases, to ignore a mediator's proposal and opting to litigate their case. Moreover, allowing parties to go back to court if they are unhappy with the result will also increase the number of parties who will try the pilot system.

Ultimately, the success or failure of the AI mediator will depend on the number of satisfied parties. Successful development of an AI system that would allow parties the option of having cases decided in an automated way would have significant benefits in terms of reducing court congestion and delivering speedy resolution of cases.

## V. WHETHER ATTORNEYS SHOULD BE REQUIRED TO DISCLOSE THEIR USE OF AI

Over the past year, a number of individual courts around the country have issued standing orders regarding the use of AI in their courtrooms.[17] These orders have taken a variety of approaches including robust disclosures as to how AI was used and what tools were employed; certifications that AI was not used, or if it was, that any AI-generated work was confirmed by humans; and simple reminders that attorneys must abide by their ethical obligations if they use AI.[18]

The Working Group believes that special rules regarding AI usage by attorneys are not warranted at this time. Over the last few decades, attorneys have had at their disposal an increasingly wide range of technology-based tools to enhance their advocacy. With the exception of TAR (technology assisted review, where there is significant disclosure of items such as keywords and custodians), attorneys have not been required to disclose their use of these tools. The implicit understanding has been that attorneys should be guided by existing professional responsibility rules when using these tools. The Working Group believes that the adoption of AI into legal advocacy, while presenting new opportunities and risks, should not warrant a different

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[15] Benjamin H. Barton, *Rebooting Justice: ODR Is Disrupting the Judicial System*, 44 LAW PRAC. 32, 36 (2018), https://ir.law.utk.edu/cgi/viewcontent.cgi?article=1101&context=utklaw_facpubs.

[16] *See also* THE COMMISSION TO REIMAGINE THE FUTURE OF N.Y.'S COURTS, ONLINE COURTS WORKING GROUP, INITIAL REPORT ON THE GOALS AND RECOMMENDATION FOR NEW YORK STATE'S ONLINE COURT SYSTEM 26-27 (Nov. 9, 2020), https://www.nycourts.gov/whatsnew/pdf/OCWG-Report.pdf.

[17] *AI Rules Tracker: Find Out If Your Court Has Adopted Rules on Generative AI*, LEXISNEXIS (Dec. 12, 2023), https://www.lexisnexis.com/community/insights/legal/b/practical-guidance/posts/ai-rules-tracker-find-out-if-your-court-has-adopted-rules-on-generative-ai.

[18] *Id.*

approach. Specifically, to the extent possible, the judiciary should rely on existing rules and regulations to regulate lawyers' use of AI, including those set forth in the New York Code of Professional Responsibility.[19]

The view of the Working Group is shaped, in part, by the wide range of uses an attorney will be able to make of AI when drafting a court filing. This can range from using AI on a one-off basis to help draft a compelling phrase to using AI to generate an entire first draft. It is not clear what benefit there would be to a court knowing that AI was used, as long as the final submission complies with all applicable rules and the attorneys' ethical obligations.

For individual judges who may be considering issuing guidance, the Working Group suggests that the court consider limiting such guidance to reminding attorneys that they must adhere to their ethical obligations when using generative AI, including having a working knowledge of how this technology functions and its attendant risks.[20]

## VI. USE OF AI BY SELF-REPRESENTED PARTIES

Today, self-represented parties comprise a large portion of the docket of courts across the country. New York State is no exception.[21] An ordinary person's lack of knowledge about the law (and how to efficiently research the law) and about court procedures puts a self-represented party at a significant disadvantage, especially if the other side is represented by counsel. In addition, there are undoubtedly untold number of claims that individuals of limited means never file because they cannot afford to hire a lawyer.

The use of generative AI tools presents a unique opportunity for self-represented parties to better represent themselves in court. AI tools can help such parties correctly identify applicable law and generate pleadings that are superior to those that self-represented parties are typically able to draft. The judiciary should also explore other ways that AI might assist self-represented litigants, such as developing a chatbot or AI tool on CourtHelp (the judiciary's website for self-

[19] Among other relevant professional responsibility rules, Rule 1.1 of the New York Code of Professional Responsibility states that a lawyer must "provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." N.Y. RULES OF PROF'L CONDUCT R. 1 (2022), https://nysba.org/app/uploads/2023/02/20221020-Rules-of-Professional-Conduct-as-amended-6.10.2022.pdf. Comment 8 to that Rule states, "To maintain the requisite knowledge and skill, a lawyer should . . . keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information . . . ." Similarly, Rule 1.6 codifies a lawyer's general obligation not to reveal information relating to the representation of a client which should address situations where lawyers are considering whether they can include a client's confidential information as a prompt. N.Y. RULES OF PROF'L CONDUCT R. 1.6 (2022), https://nysba.org/app/uploads/2023/02/20221020-Rules-of-Professional-Conduct-as-amended-6.10.2022.pdf.

[20] *See, e.g.*, ARUN SUBRAMANIAN, UNITED STATES DISTRICT JUDGE, INDIVIDUAL PRACTICES IN CIVIL CASES 7 (July 29, 2023), https://www.nysd.uscourts.gov/sites/default/files/practice_documents/AS%20Subramanian%20Civil%20Individual%20Practices.pdf.

[21] *See, e.g.*, PERMANENT COMMISSION ON ACCESS TO JUSTICE, REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK 15-17 (Nov. 2023), https://www.nycourts.gov/LegacyPDFS/accesstojusticecommission/23_ATJ-Comission_Report.pdf.

represented parties) that provides legal information and standard forms.[22] Overall, the Working Group believes there is great potential for AI to improve the access to justice burden that impacts so many.[23]

At the same time, AI tools could make it so easy and fast to generate meritorious-sounding pleadings that self-represented litigants who may be aware they do not have a legitimate claim nonetheless opt to file a lawsuit. Relatedly, some litigants who would otherwise consult counsel might lose the benefit of counsel filtering out meritless claims. Both scenarios could lead to an increase in the number of non-meritorious cases presented to, and the burden on, the courts.

Given that the use of AI to generate text of all kinds is rapidly expanding, the Working Group believes that the potential of an influx of AI-generated filings by self-represented litigants in the near-term is a reality. The judiciary should therefore closely monitor this issue, and consider appropriate guardrails to maximize the benefits of AI use by self-represented parties while mitigating any potential risks. For example, the judiciary might study the use of AI tools that can detect pleadings that are frivolous despite being AI-generated. The judiciary may also want to consider whether self-represented parties should be required to disclose with specificity how they used AI since they are not bound by the same ethical rules as attorneys.[24]

## VII. EVIDENTIARY ISSUES PRESENTED BY AI

Until such time that there might be specific evidentiary rules addressing AI-generated evidence, questions raised by AI will be decided in the context of the existing rules of evidence. Numerous articles have been written on that subject and it is beyond the scope of this report to address such issues in detail.[25] Rather, we highlight two specific areas where applying existing evidentiary rules to this transformational technology may present particular challenges.

The first concerns "deepfakes," AI-generated content that appears real, but is in fact fictitious.[26] On the one hand, it is not unusual for courts to be presented with evidence (such as video or audio tape) that a party claims was doctored. The difference with deepfakes, however, is the ubiquity of the tools that allows them to be created quickly and inexpensively, as well as a level of realism that makes detection much harder. This not only means the potential for such evidence

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[22] This might be done though the judiciary's website which, in 2022, was viewed more than 10 million times. N.Y. STATE UNIFIED COURT SYS., 2022 ANNUAL REPORT 26, https://www.nycourts.gov/legacyPDFS/22_UCS-Annual_Report.pdf; *see also* NATL. CTR. FOR STATE COURTS, COURT CHATBOTS 7-8 (2024), https://www.ncsc.org/__data/assets/pdf_file/0032/97187/Court-Chatbots.pdf.

[23] Andrew Perlman, *The Implications of ChatGPT for Legal Services and Society* (Suffolk Law Sch., Working Paper No. 22-14, Feb. 29, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4294197.

[24] *See also Self-Represented Litigants (SRL)*, U.S. DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, https://www.moed.uscourts.gov/self-represented-litigants-srl (banning self-represented parties from using AI in their submissions to the court).

[25] *See, e.g.*, Paul Grimm et al., *Artificial Justice: The Quandary of AI in the Courtroom*, JUDICATURE INT'L (2022), https://judicature.duke.edu/articles/artificial-justice-the-quandary-of-ai-in-the-courtroom/.

[26] *See, e.g.*, GOV'T ACCOUNTABILITY OFF., SCIENCE & TECH SPOTLIGHT: DEEPFAKES (Feb. 2020), https://www.gao.gov/assets/gao-20-379sp.pdf.

to be introduced and then challenged by the other party, but also for parties to allege that legitimate evidence is a "deepfake." Because courts currently lack the tools to easily detect a deepfake, resolving this issue will likely require courts to decide between competing expert reports and testimony that will have to delve deeply into the technology itself. That is a level of analysis that is not typically required concerning issues of admissibility.

A second issue that courts will need to contend with relates to "explainability" in cases where AI is used to analyze certain data and the result is introduced as evidence.[27] In many cases, even the developers of AI models cannot explain how certain outputs were generated from their models.[28] Thus, for the first time, courts may be required to assess the admissibility of evidence where the manner in which that evidence was developed cannot be fully explained. While one solution could be that courts only permit the introduction of AI-generated evidence where the path from inputs to output can be fully traced and explained, that could effectively eliminate use of some of the more powerful AI tools to analyze data to support a party's position. The judiciary may need to develop new paradigms for assessing AI models.[29]

## VIII. USE OF AI FOR CREDIBILITY DETERMINATIONS

Whether AI can improve credibility determinations in a case is not yet clear. There are already studies that seek to identify the reactions of people based on various metrics such as facial expressions, body language, tone of voice, and even physiological responses,[30] such as the blood flow patterns in a subject's face.[31] One can imagine AI systems that can take this data as input and detect patterns that humans overlook. Arguably, objective determinations such as these are better arbiters of credibility than a judge's subjective "reading" of people, which could be influenced by her own biases and personal experiences. Furthermore, there are now studies that show that demeanor – one of the key factors a judge looks at – is of limited value because it can be affected by many factors including the culture of the witness, stereotypical attitudes, and the artificiality of and pressures associated with a courtroom.[32]

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[27] NAT'L INST. OF STANDARDS & TECH., FOUR PRINCIPLES OF EXPLAINABLE ARTIFICIAL INTELLIGENCE 13 (Aug. 2020), https://nvlpubs.nist.gov/nistpubs/ir/2020/NIST.IR.8312-draft.pdf.

[28] Noam Hassenfeld, *Even the Scientists Who Build AI Can't Tell You How It Works*, VOX (July 15, 2023), https://www.vox.com/unexplainable/2023/7/15/23793840/chat-gpt-ai-science-mystery-unexplainable-podcast.

[29] N.Y. STATE BAR ASS'N TASK FORCE ON A.I., REPORT AND RECOMMENDATIONS OF THE NEW YORK STATE BAR ASSOCIATION TASK FORCE ON ARTIFICIAL INTELLIGENCE 50, 67-68 (Apr. 6, 2024), https://nysba.org/app/uploads/2022/03/2024-April-Report-and-Recommendations-of-the-Task-Force-on-Artificial-Intelligence.pdf.

[30] *See generally* NAT'L INST. OF STANDARDS & TECH., FOUR PRINCIPLES OF EXPLAINABLE ARTIFICIAL INTELLIGENCE 13 (Aug. 2020), https://nvlpubs.nist.gov/nistpubs/ir/2020/NIST.IR.8312-draft.pdf.

[31] Omar Ha-Redeye, *Using Artificial Intelligence for Demeanor Evidence*, SLAW (Mar. 24, 2019), https://www.slaw.ca/2019/03/24/using-artificial-intelligence-for-demeanour-evidence/.

[32] *See, e.g.*, Mark Bennett, *The Changing Science on Memory and Demeanor – and What It Means for Trial Judges*, JUDICATURE (2017), https://judicature.duke.edu/articles/the-changing-science-on-memory-and-demeanor-and-what-it-means-for-trial-judges/.

On the other hand, determining whether another person is credible would seem to be an inherently human task that cannot be relegated to an algorithm, no matter how sophisticated the technology and no matter how many seemingly objective criteria it is testing for. Some of the judges that spoke with the Working Group considered it among the most important part of their function to be able to look at the witness sitting a few feet from them and make determinations about credibility. Furthermore, the risk of bias in using AI for this purpose is arguably too great because of differences in characteristics, such as body language and facial expressions, across different demographic groups.[33]

It is possible that AI technology will develop to the point that it can be demonstrated with certainty that algorithms are significantly better than humans in determining credibility. Even were that to happen, there would still be constitutional implications owing to the right to trial by jury found in the Sixth and Seventh Amendments.[34] The Working Group recommends that this is an area of AI development that courts should monitor but, for now, credibility determinations are better left where they are, with human judgment, experience, and intuition playing a crucial role in evaluating witness credibility.

# IX. AI AND COURT OPERATIONS

## A. *Improving Workflows*

While much of the focus on AI has been on its ability to generate new content or analyze data, AI will also play a critical role in improving workflows and processes across a wide range of tasks. The Working Group recommends that the New York State judiciary study how AI can enhance and improve workflows throughout the state court system. This study could be spearheaded, for example, through the state judiciary's Division of Technology, Office of Court Research, the Counsel's Office, or the Judicial Institute. The Working Group also recommends that the state judiciary consider licensing AI technology that offers workflow solutions for pilot programs designed to enhance judicial administration. The Division of Technology should also designate specific employees who are responsible for studying AI technology and its potential use cases.

## B. *Development of AI Tools for the Judiciary*

Organizations across a wide swath of industries are currently debating whether it is more economical to build their own AI tools rather than license in a third-party tool, and whether such "homegrown" tools will yield superior results. The view of the Working Group is that the New York State judiciary is better served, in the short term at least, by licensing AI tools rather than building its own. This perspective is shaped by the high cost of developing internal tools, and by the number of legal-industry specific AI tools that are already on the market and being improved.

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[33] *See, e.g.*, Leslie A. Zebrowitz et al., *Facial Resemblance to Emotions: Group Differences, Impression Effects, and Race Stereotypes*, 98 J. PERSONALITY & SOC. PSYCH. 175 (2010), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3677560/.

[34] *See, e.g.*, JAMES BAKER ET AL., CTR. FOR SECURITY & EMERGING TECH., AI FOR JUDGES 11, https://www.armfor.uscourts.gov/ConfHandout/2022ConfHandout/Baker2021DecCenterForSecurityAndEmergingTechnology1.pdf.

Over time, this perspective may change, but for now, licensing AI tools will permit the judiciary to test and potentially start to implement AI tools on an expedited timetable, and it will allow New York courts to stay current with developments in other court systems and with the use of AI by attorneys who appear in the state's courtrooms. The state judiciary should also consider applying lessons from its development of the New York State Courts Electronic Filing (NYSCEF) tool and eTrack, which allows parties to monitor cases, to its implementation of AI tools.

The New York State judiciary, particularly through its Office of Court Research, should also explore how it can make the best use of the vast amounts of content, records, and data it possesses.[35] These materials should prove to be a valuable resource in training and fine-tuning AI models that support the judiciary and potentially the broader legal profession. For example, AI-based data analytics might guide judges on which types of cases are most likely to settle once a case is ready for trial, thereby helping judges better manage their dockets. Similarly, courts may be able to identify case management patterns with respect to certain types of cases, allowing them to determine the optimal timeframe for issuing scheduling orders in such cases. To help ensure internal or licensed AI tools provide accurate results, the judiciary should consider collecting information about cases on a uniform basis. That information may include how many judges are assigned to a court, what case types and number of cases each of those judges is presiding over, and how many motions are outstanding. This information could be used as input into an AI tool for improving court operations, including by allocating scarce judicial resources. An ancillary benefit of uniform data collection is that it would allow the judiciary to publicize that information so the public has a better understanding of court operations.

As the state judiciary explores the licensing of AI tools, it should be mindful of the terms and conditions that accompany such tools, especially given the wide range of positions taken by AI providers. Among other provisions, courts should be focused on: how the prompts and other inputs they enter may be repurposed by the AI tool providers (and which party owns those inputs); ownership of the output generated by these tools; disclaimers of warranty; and indemnification and liability, particularly as it relates to indemnity for infringement arising out of the outputs that are generated. In all of these cases, courts should assume that there may be room for negotiation, and should also explore whether enterprise-wide licenses will yield better terms.

### C. *Potential Job Displacement*

The question of whether the adoption of AI will result in job displacement permeates every industry, and the judicial system is no exception. The Working Group believes that it is too early to predict how AI might impact jobs within the judicial system, what types of jobs are at risk, or what steps courts should be taking now.[36] However, the Working Group cautions that it would be a mistake for the New York State judiciary to ignore the potential impact of AI on jobs within the

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[35] For example, since New York State adopted NYSCEF in 1999, "[n]early six million cases have been e-filed" and "more than 72 million documents have been e-filed." NEW YORK STATE UNIFIED COURT SYSTEM, 2023 ANNUAL REPORT 62, https://www.nycourts.gov/legacyPDFS/23-Annual-Report.pdf.

[36] *See also* Rachel Curry, *How A.I. Can Help Create Jobs for Humans, Not Just Automate Them*, CNBC (Aug. 10, 2023), https://www.cnbc.com/2023/08/10/how-ai-can-help-create-jobs-for-humans-not-just-automate-them.html (reporting that AI is creating jobs, including "[d]eep learning engineers, AI chatbot developers, prompt engineers, data annotators," AI artists, and AI ethicists).

court system. If it does so, the judiciary could be in the unenviable position of being reactive to these developments, rather than having a proactive plan. The Working Group therefore recommends that the New York State judiciary monitor developments in this space, including the impact other courts have experienced, so that it can adopt a thoughtful and measured view as to how address this issue. The judiciary should consider, among other areas, how AI adoption might impact hiring needs, how AI might alleviate hiring shortages in certain areas, what skillsets will be important for AI usage, what retraining might be appropriate, and how its employees might use AI to enhance their job responsibilities. The judiciary should also ensure that, while it builds a modern workforce, it does so in a way that does not threaten or impeach its integrity, which has been established over the decades.

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# Appendix A

## BACKGROUND TO THE WORKING GROUP

As a result of the New York State judiciary's initiative in modernizing its technology, and in light of the rapid advances in AI, the New York City Bar Association, through its Council on Judicial Administration ("CJA")[37] and its Task Force on Digital Technologies ("Task Force"),[38] established the Working Group on Judicial Administration and Artificial Intelligence in May 2023.[39] The Working Group is a project between the CJA and the Task Force established to highlight issues related to AI use within the New York State judiciary, and where appropriate to provide guidance. This report has also been reviewed by and incorporates feedback from the CJA, which includes New York State judges, and from the Task Force, which includes technology lawyers.

This report is based on (1) research and analysis conducted by JAAI; (2) interviews by JAAI of state judges, federal judges, court administrators, litigators, professors, AI startup leaders, AI researchers, and others; (3) recommendations and writings of academics, former and current judges, lawyers, and AI experts; (4) review of actions taken and reports issued by various courts, including those in New York; (5) review of congressional hearings on AI; and (6) review of webinars and course materials from the National Center for State Courts and law schools. This report is based on research conducted independent of other organizations involved in studying this subject. The views expressed in this report are the consensus views of the Working Group and do not necessarily represent the views of the individual members of the Working Group, nor the organizations or firms with which they are affiliated. This report also does not necessarily represent the views of the individuals interviewed by the Working Group, nor the organizations with which they are affiliated. The Working Group thanks the presenters for their time, expertise, and commitment to this report, and recommends them as a resource for the state judiciary. The Working Group also expresses special thanks to the Office of Court Administration's Justin Barry, Christine Sisario, and Sheng Guo for their input. In addition, the Working Group expresses special gratitude to Jerome Walker of Jerome Walker PLLC. A list of individuals interviewed by the Working Group and a selected bibliography is set forth below:

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[37] *Council on Judicial Administration*, NEW YORK CITY BAR ASS'N, https://www.nycbar.org/committees/council-on-judicial-administration/.

[38] *Task Force on Digital Technologies*, NEW YORK CITY BAR ASS'N, https://www.nycbar.org/member-and-career-services/committees/digital-technologies-task-force-on.

[39] JAAI is chaired by Harut Minasian, federal judicial law clerk and former New York State judicial law clerk (CJA and Task Force). Other members of JAAI include the Honorable Abena Darkeh of the New York City Criminal Court (CJA); Richard Hong, partner at Morrison Cohen (CJA and chair of the City Bar's Federal Courts Committee); Stuart Levi, partner at Skadden (Task Force); Richard Scarola, partner at Scarola Zubatov Schaffzin (CJA and Task Force); John Werner, former Chief Clerk of New York Supreme Court, New York County Civil Branch (CJA); and David Zaslowsky, partner at Baker McKenzie (Task Force).

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**The Hon. Paul Grimm (Ret.)**
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**Suresh Venkatasubramanian**

Professor, Brown University and former White House AI adviser

**Casey Kennedy**
Director of Information Services, Texas Courts

**Gordon Moodie**
Chief Product Officer, Harvey

**Jim Sandman**
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**Pablo Arredondo**
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**Cynthia Guerra**
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# Appendix B

| State | Jurisdiction | Use Case | Source |
|---|---|---|---|
| **Florida** | Palm Beach County | Document processing | JOINT TECH. COMM., INTRODUCTION TO AI FOR COURTS 3-4, 7 (Mar. 27, 2020), https://www.ncsc.org/__data/assets/pdf_file/0013/20830/2020-04-02-intro-to-ai-for-courts_final.pdf |
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