Generative AI
and the Future of the Courts

Responsibilities and Possibilities

COSCA
Conference of State Court Administrators

Gen AI and the Future of the Courts

Artificial or Augmented Intelligence (AI) has been ubiquitous for more than twenty years. What has made AI the recent focus of heightened attention is the widespread introduction and availability of generative AI. Beginning with the release of ChatGPT on November 30, 2022, the possibilities of artificial intelligence, both positive and negative, exploded into the public consciousness.

By the time ChatGPT was released to the public, most people, whether they were aware of it or not, had already been using narrow artificial intelligence for some time. Unless they had chosen to opt-out, AI was already suggesting the next word for text messages, recommending movies and music, correcting grammar in documents and emails, and using facial recognition to unlock phones and expedite travel. Generative AI, with its ability to self-teach based on vast amounts of data, is poised to be a disruptor in the workplace of the same magnitude as the introduction of the personal computer in the early 1980s.

IBM defines generative AI as "deep-learning models that can generate high-quality texts, images, and other content based on the data they were trained on."[1] Gartner, a Connecticut-based firm that has long been recognized as an industry leader in technology research and consulting, explains it as "AI techniques that learn a representation of artifacts from data, and use it to generate brand-new unique artifacts that resemble but don't repeat the original data…Generative AI can produce totally novel content (including text, images, video, audio, structures), computer code, synthetic data, workflows and models of physical objects."[2] Unlike most technological innovations that enter mainstream use through a predictable cycle of early adoption by innovative and well-funded users, generative AI has been strategically released as a free service that is accessible to even the most casual technology user. This sudden appearance of a new technology that is ubiquitous, powerful and widely available has left many individuals wondering whether it is something to be feared or embraced.

The Technology Hype model developed by Gartner is a model that demonstrates the lifecycle of technology from innovation to mainstream adoption and the changing expectations for a technological innovation over time.[3] It is useful for the courts to consider generative AI as being in a cycle of inflated expectations, where both the positive and negative potentials are still largely speculative and the eventual common use of the tool is yet to be seen. Despite generative AI being in the early stages of its lifecycle, courts cannot afford to ignore it. We do not have the luxury of waiting for appropriate test cases to appear at our collective doorstep. Generative AI is already being used daily by individuals and entities worldwide, intentionally and unintentionally, for good and

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[1] IBM. *What is Generative AI?* Found at: https://research.ibm.com/blog/what-is-generative-ai

[2] https://www.gartner.com/en/information-technology/glossary/generative-ai#:~:text=Generative%20ai%20refers%20to%20ai,t%20repeat%20the%20original%20data.

[3] Gartner Hype Cycle. Found at: https://www.gartner.com/en/research/methodologies/gartner-hype-cycle

for evil, for fun and for profit.[4] The rapid proliferation of generative AI means that in the near term, courts will be expected to grapple with its impact. We must understand its promises and limitations and make deliberate decisions on how to use it to make court processes more efficient, accessible and equitable and to manage court systems more efficiently. In short, we must proceed judiciously, but with a speed at which many court systems are not comfortable, to ensure the coming wave of change will not find us out of our depth.

The public is clearly taken with this new application and its many uses. Two months after its release to the public, ChatGPT reached an estimated 100 million active monthly users, the fastest growing user base of any application in history.[5] Finding answers seemed to become so much quicker, easier and simpler. Searching the internet for a list of books and websites on a particular topic, and then having to slog through page after page to find the portions relevant to your question suddenly seemed too time consuming and unnecessary. Why not just have a conversation with an apparent expert that has already read everything available on the topic? Why spend time filtering through vast amounts of possibly irrelevant information to find the fact or document relevant to your question when a chatbot could summarize all the information for you? And why spend hours creating a draft document or preparing a speech when a chatbot could do that for you in minutes, or even seconds?

Just as the public's interest in the possibilities of AI has soared, so too has interest risen for those who work in the courts. Chief Justice John Roberts dedicated the majority of his 2023 end of year report to the topic.[6] Organizations including the National Association for Court Management (NACM), the Center for Justice Innovation (formerly known as the Center for Court Innovation), the American Bar Association (ABA) and the Joint Technology Committee (JTC) comprised of NACM, the Conference of State Court Administrators (COSCA), and the National Center for State Courts (NCSC), have all formed groups to investigate, research and write about how generative AI will impact the courts and the legal profession. The Conference of Chief Justices (CCJ) and COSCA have organized a Rapid Response Team that is supported by NCSC and tasked it with developing policy recommendations for state courts regarding the ethical use of generative AI by courts and attorneys, model court rules regarding the disclosure of the use of AI, and education recommendations regarding AI generated materials.[7] In addition, NCSC has created both an online Resource Center and map with state specific information about AI,[8] and an AI Implementer's Forum

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[4] According to the 2024 McKinsey Global Survey, 65% of those responding reported they are regularly using generative AI in their organization. The survey report can be found at: https://www.mckinsey.com/capabilities/quantumblack/our-insights/the-state-of-ai

[5] https://arstechnica.com/information-technology/2023/02/chatgpt-sets-record-for-fastest-growing-user-base-in-history-report-says/

[6] https://www.supremecourt.gov/publicinfo/year-end/2023year-endreport.pdf (Last visited on 2/13/2024)

[7] https://www.ncsc.org/consulting-and-research/areas-of-expertise/technology/artificial-intelligence/state-activities/ai-rapid-response-team and https://www.ncsc.org/consulting-and-research/areas-of-expertise/technology/artificial-intelligence

[8] https://www.ncsc.org/consulting-and-research/areas-of-expertise/technology/artificial-intelligence/events-and-activities

to provide a venue and clearinghouse of information for court technologists.[9] This interest in the possible benefits of AI is promising. It is evident that court professionals see not only the potential issues being raised in legal proceedings related to how generative AI can be used but also its potential for improving the administrative functions of courts, and its potential to supplement efforts to provide greater access to justice.

Courts Must Lead by Developing Expertise in Generative AI

Continued public trust and confidence in courts requires judges to be proficient in addressing new issues that will arise in cases. Canon 2 of the model code of judicial conduct states, "A judge shall perform the duties of judicial office impartially, competently, and diligently." In turn, the model rules of professional conduct for attorneys recognize that competence includes maintaining requisite technological knowledge and skills. According to the blog LawSites, 40 states have adopted a version of ABA Model Rules of Professional Conduct to include a duty to be competent in the use of technology.[10] South Carolina, which appears to be the latest state to adopt this requirement, uses language in the comment to Rule 1.1 that is similar to what most states have adopted: ***To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including a reasonable understanding of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit information related to the representation of a client, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.***[11]

Educating judges will be critical since knowledgeable and skilled attorneys are not only implementing AI tools in their practice but are also raising new and creative legal arguments related to AI. Judicial education programs must ensure that judges understand technical language and use the correct terminology when discussing and ruling on AI and other technology-related issues. To achieve this, courts must be willing to rely on technological experts to teach judges about what technology currently exists, how it is being used in the practice of law by attorneys and self-represented litigants, what it can and cannot do, and what it may be able to do in the near future. Just as important, is the need to educate judges about the ethical and legal questions raised by the development and use of generative AI technology.

No longer is it acceptable for a judge to unilaterally declare themself a Luddite and refuse to adapt to new technology. With the introduction of generative AI, it is even more imperative that every member of the court system understand how and when technology is being used in their everyday work life.

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[9] https://www.ncsc.org/consulting-and-research/areas-of-expertise/technology/artificial-intelligence/events-and-activities

[10] Ambrogi, Robert. *40 States Have Adopted the Duty of Technology Competence.* Original posting date unknown. Last accessed March 1, 2024. Found at: https://www.lawnext.com/tech-competence#:~:text=The%20opinion%20 expressly%20cites%20the,and%20risks%20associated%20with%20technology.%E2%80%9D

[11] South Carolina Rules of Professional Conduct, Rule 1.1: Competence. Found at: https://www.sccourts.org/courtReg/ displayRule.cfm?ruleID=407.0&subRuleID=RULE%201%2E1&ruleType=APP

Nowhere is this more important than in the role of the judge who will be increasingly called upon to rule on information provided through AI, to make findings of fact to resolve arguments regarding AI, or render judgments in novel cases involving the use of AI.

Although there are many sources available for those who want to learn about AI, COSCA recommends that courts begin with a primer written by the American Association for the Advancement of Science, *Artificial Intelligence and the Courts: Materials for Judges*.[12] This is a foundational document to begin educating individual judges and court staff on the basics of artificial intelligence because it is written in collaboration with court experts and is geared specifically toward judicial officers.

Courts Should Set Standards for Transparency and Privacy in the Use of Generative AI

Public confidence in the courts depends not only on what judges and court administrators know about AI, but also what the public knows about how the courts themselves implement AI systems. To address the concerns that will inevitably arise, courts must be transparent about the AI systems they use, how they are selected, and any criteria or standards applied to the use of AI in courts. They must be open to investigating claims of error or bias and be able to authoritatively address any potential claims about the impact of AI on cases and outcomes.[13]

Internally, courts must begin to develop policies to guide work with AI-assisted technologies. There are already AI components embedded in commonly used tools such as word processing, email, virtual meeting platforms, and legal research programs. As employees find time and labor savings through the use of these tools, they will need guidance on what is acceptable, what processes should be followed to have a tool approved, and the implications of adopting new software programs.

Courts must be especially mindful that once data is captured by many generative AI programs it becomes part of its library. We must guard against the unintentional exposure of private or confidential information that can be used to identify individual court users. Court policies should include a public disclosure notification whenever the court authorizes a data transfer to a generative AI program.

Similarly, if a court introduces a service such as chatbots or guided forms that are built on generative

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[12] American Association for the Advancement of Science. Artificial Intelligence and the Courts: Materials for Judges. September 2022. Found at: https://www.aaas.org/ai2/projects/law/judicialpapers

[13] Hundt, Andrew, William Agnew, Vicky Zeng, Severin Kacianka, and Matthew Gombolay. 2022. Robots Enact Malignant Stereotypes. In 2022 ACM Conference on Fairness, Accountability, and Transparency (FAccT '22), June 21– 24, 2022, Seoul, Republic of Korea. Found at: https://doi.org/10.1145/3531146.3533138

AI platforms, users should be provided a disclosure explaining that their data may become part of a Large Language Model[14] and given an option to opt-out that includes an alternative method of proceeding.

Courts need to be aware of the terms of use for the applications they regularly use and what those terms are regarding the use of user data to train its AI component. This includes non-court specific technology like video conference applications, word processing software, research applications, and project management tools. As recently reported in *The New York Times*, major tech companies such as Google, Meta and Snap have already made changes in their privacy policies.[15] It is essential to understand whether there are opt-out provisions. Court administrators should also understand how their various court-specific technology applications, such as case management systems, efiling systems, document management systems, evidence management systems, online dispute resolution platforms, and financial and human resource management systems, use the court's data to train AI and whether it has potential to be shared outside the court system. When procuring new systems or software that use AI, language in the Requests for Proposals should outline what the court's position is regarding what will be permissible or prohibited for training AI using court data.

Courts need to reconsider the data generated through court cases and the business administration of the court system not just in the context of ultimate ownership but as a data governance ownership and use lifecycle. These issues need to become a standard consideration in contracting for software services. Courts should carefully review all current and future software contracts for any generative AI implications. In the past, software contracts typically only covered the ownership of data that was entered into a court-controlled system. Court leaders must now be mindful of the potential that in using programs that employ generative AI, data that is entered into the program is providing the system with information that can be interpreted and used by the software itself and by the vendor in ways that are unrelated to the needs and intentions of individual courts. Furthermore, data that court systems used to control through their access, retention and destruction policies may now be largely out of their control. The National Center for State Courts has developed three tools, *Data Governance Policy Guide*,[16] *Contracting for Digital Services*,[17] and *Exiting Technology Projects*,[18] that court managers can turn to for assistance in these situations.

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[14]   Amazon Web Services (AWS) explains that "large language models are very large deep-learning models that are pre-trained on vast amounts of data." Deep learning "is a method of AI that teaches computers to process data in a way that is inspired by the human brain." https://aws.amazon.com/what-is/large-language-model/#:~:text=What%20 are%20Large%20Language%20Models?%20Large%20language,encoder%20and%20a%20decoder%20with%20 self%2Dattention%20capabilities.

[15]   Tan, Eli. *When the Terms of Service Change to Make Way for A.I. Training*. New York Times. June 26, 2024. Found at: https://www.nytimes.com/2024/06/26/technology/terms-service-ai-training.html?smid=nytcore-android-share.

[16]   National Center for State Courts, Court Statistics Project. *Data Governance Policy Guide*. 2020. Found at: https://www.courtstatistics.org/__data/assets/pdf_file/0014/23900/data-governance-final.pdf

[17]   National Center for State Courts. *Contracting for Digital Services*. May 2022. Found at: https://www.ncsc.org/__data/assets/pdf_file/0029/76754/Contracting-Digital-Services.pdf

[18]   National Center for State Courts. *Exiting Technology Projects*. Provided under license by Small Scale Consulting, LLC 2021-2022. Found at: https://www.ncsc.org/__data/assets/pdf_file/0028/74782/Exiting-Tech-Projects-v2.pdf

Where appropriate, courts should work together to create standards for AI vendors that will respect and protect the confidentiality of work product and certain court proceedings. All courts have an interest in utilizing technology, but also in ensuring that this can be done in a way in which the needs of the courts can be met. A single court requesting that a software company adjust its products to account for this in licensing and contract terms may not have sufficient impact, but a multitude of courts requiring the same or similar concessions in requests for proposals and contracts may create an industry expectation and momentum toward meeting the requirements. State courts standing together with the same technical and privacy standards will demonstrate to the software industry the importance of investing in their development. Courts should pay close attention to the work products being developed through the CCJ/COSCA Rapid Response Team on AI and the work of the JTC as the products they release will be designed specifically to meet court needs in this area.

Courts Must Acknowledge the Risks Associated with AI

The challenges of AI, including its limitations and hazards, have not caught the public's interest in the same manner as have its possibilities and opportunities. It is true that generative AI chatbots can and often will provide an answer to almost any question. The answer, however, is not necessarily *the correct* answer or may even be a wholly-manufactured answer (commonly referred to as a "hallucination"). Just as computer systems have always followed the concept of garbage in — garbage out, so too are generative AI systems limited by the information on which they are trained and the data sources they can access. Results of systems trained solely on historic data will reflect and reinforce historical biases and are particularly susceptible to manipulation, thereby perpetuating harm. Already there are numerous examples of generative AI being manipulated into producing racist, sexist, and antisemitic content.[19]

The risks that AI systems pose extend beyond limitations inherent in the tools. Users of the tools, whether through innocent mistake or purposeful misbehavior, may also produce damaging materials. There are already several public examples of attorneys who have learned too late about generative AI's ability to return search results that may include incorrect, misleading, or non-existent citations to caselaw.[20]

The introduction of voice and video recordings as evidence in court proceedings is widespread. Whether through the admission of a recorded confession, phone conversation, or video that captured an event or accident, courts admit this type of evidence to prove or disprove facts every day. The proliferation of tools which allow for the easy creation of these frequently relied upon recordings holds the possibility of upending the fact-finding function of courts. Tools to enhance

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[19] Verma, Pranshu. *These robots were trained on AI. They became racist and sexist.* Washington Post. July 16, 2022. Found at: https://www.washingtonpost.com/technology/2022/07/16/racist-robots-ai/

[20] See for example: https://www.npr.org/2023/12/30/1222273745/michael-cohen-ai-fake-legal-cases#:~:text=Yuki%20Iwamura%2FAP-,Michael%20Cohen%20arrives%20at%20New%20York%20Supreme%20Court%20for%20former,to%20a%20New%20York%20judge or https://www.reuters.com/legal/transactional/another-ny-lawyer-faces-discipline-after-ai-chatbot-invented-case-citation-2024-01-30/

real evidence or create deepfake audio and video are now becoming commercially available and pose a plethora of risk to courts. These AI tools allow users to generate a new image or recording that has been convincingly altered or manipulated to misrepresent someone as doing or saying something that was not actually done or said. This new content can appear authentic and may then be submitted as evidence in a court case.

Deepfakes may be offered by parties, whether mistakenly or nefariously, to affirmatively prove falsehoods. Parties may also attempt to deflect the damage of evidence by simply introducing the possibility that it could be a deepfake during authentication procedures or in the minds of factfinders.[21] Even if evidence is properly authenticated and admitted, knowing of the existence of deepfake technology may sow doubt in the minds of well-intentioned jurors that the evidence can be relied upon. In light of these concerns, some are already calling for an expansion of the role of courts in authenticating evidence.[22]

For courts, deepfake technology poses threats not only to a court's fact-finding processes, but to the credibility of the institution itself. If the public begins to believe that courts are unable to decipher the authenticity of evidence or that courts can be manipulated with fake evidence, confidence in courts as an institution will be seriously harmed. Given the possible impact, courts must make intentional choices on whether they should take a more proactive role in the authentication of admitted evidence.

Courts must also consider the impact of generative AI's ability to identify dozens of citations that may be relevant to an argument. Rather than carefully researching all options and choosing only those that best support a position, litigants may choose to simply include all of the suggested citations. This is a particular concern when the individual is a self-represented litigant who may lack the ability to research and understand the relevance of the suggested cases. To deal with the influx, courts should anticipate the need for an increase in legally-trained court staff to assist judges in evaluating legal citations for their relevance and weight.

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[21]   See for example: https://fortune.com/2023/04/27/elon-musk-lawyers-argue-recordings-of-him-touting-tesla-autopilot-safety-could-be-deepfakes/.

[22]   Delfino, Rebecca A. *Deepfakes on Trial: A Call To Expand the Trial Judge's Gatekeeping Role To Protect Legal Proceedings from Technological Fakery*. Hastings Law Journal. 2023. Found at: https://repository.uchastings.edu/hastings_law_journal/vol74/iss2/3

Courts Have an Obligation to Ensure AI Access is Fair

According to a 2015 study conducted by NCSC, in 72% of family law cases and 76% of nonfamily law civil cases, at least one party is self-represented.[23] Another study conducted by The Legal Services Corporation estimates that low-income Americans did not receive any or enough legal help for 92% of their civil legal problems.[24] Those unable to afford an attorney have historically struggled to navigate the legal system and avoid procedural hurdles. The use of generative AI products will surely benefit self-represented litigants (SRLs). The ability to more easily access legal research, to complete self-help forms, and to find plain-language explanations of court processes may upskill SRLs, increasing their ability to have claims resolved on the merits.

Easy access to AI-powered research and drafting tools, while potentially addressing one problem, will nevertheless create an even greater knowledge imbalance between self-represented litigants and clients who can afford legal representation. Lawyers have access to subscription-based legal databases and can reasonably rely on them for robust and accurate information. The self-represented litigant who turns to free web sources does not have those assurances and lacks the legal education to discern whether the information or forms they produce are good or bad. Courts must be prepared to deal with a flood of bad legal information being unintentionally introduced into court proceedings.[25] Simply dismissing a case or instructing self-represented litigants to "try again" if filings have been found to include case hallucinations or spurious legal arguments serves little purpose beyond clearing a particular matter off a court's docket.

On a statewide level, courts should assess the resources available to self-represented litigants and move to make them more robust. These might include such things as:

- Providing a statewide self-help resource center that can be accessed through remote means

- Purchasing an enterprise license for self-help centers so they can provide limited access to traditional subscription-based legal resources to self-represented litigants at a no-cost or reduced cost option

- Ensuring that court decisions, court rules and local administrative policies are freely available online in an easily searchable database and encouraging state legislatures to make the same access available for statutes, session laws and administrative codes

- Upskilling court staff or using staff attorneys or law clerks to provide triage services for self-represented litigants which could include an initial review of draft documents to check for obvious drafting errors and hallucinated caselaw

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[23]   National Center for State Courts. *Civil Justice Initiative: The Landscape of Civil Litigation in State Courts.* 2015. https://www.ncsc.org/__data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf

[24]   Legal Services Corporation. *The Justice Gap: Measuring the Unmet Civil Needs of Low-Income Americans.* April 2022. https://justicegap.lsc.gov/the-report/

[25]   For more on this, in a deliberatively lighthearted video format, see NCSC's Tiny Chat 138: Sea of Junk, at https://vimeo.com/showcase/7003975/video/920110405.

Self-help center staff are ideally suited to take on some of these duties as they are organizationally stationed at arms-length from the adjudicative process. Absent a self-help center, courts can introduce specialized training for non-lawyer staff on how to verify the authenticity of legal citations provided by a generative AI tool.

Concerns that expanding the duties of court employees to assist self-represented litigants in these ways will constitute the unauthorized practice of law can be resolved through adoption or amendment of existing court policies or rules. In his recently published retrospective on the court's duty to provide legal information to litigants, court expert John Greacen reviews the evolutionary understanding of the dichotomy between legal information and legal advice, and notes that if a court has authorized staff to undertake an activity, then it cannot be considered the unauthorized practice of law.[26]

The ABA model definition of the practice of law is "the application of legal principles and judgments with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law."[27] By this definition, providing objectively neutral information about whether data entered into a field in a form is responsive to the question being asked or whether a listed citation represents an actual case would not constitute the practice of law.[28]

It is in the interest of judicial efficiency that court employees be empowered to screen out obvious errors for those who lack the legal training to recognize them. These pre-adjudication steps save judicial time and increase the number of cases that are resolved on their merit rather than dismissed due to error.

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[26] Greacen, John M. *Legal Information vs. Legal Advice, A 25-year Retrospective.* Judicature. Vol. 106, No. 2. Duke University School of Law. 2022. https://judicature.duke.edu/wp-content/uploads/2022/09/GREACEN_ Summer2022.pdf

[27] American Bar Association Model Definition of the Practice of Law (Draft 9/18/02). https://www.americanbar.org/ groups/professional_responsibility/task_force_model_definition_practice_law/model_definition_definition/

[28] For specific examples of how some courts have used rules or policies to protect staff who assist end-users, see Washington Rule of Court, GR 24, https://www.courts.wa.gov/court_rules/pdf/GR/GA_GR_24_00_00.pdf and Illinois Supreme Court Policy on Assistance to Court Users by Circuit Court Clerks, Court Staff, Law Librarians and Court Volunteers ("Safe Harbor Policy"). https://ilcourtsaudio.blob.core.windows.net/antilles-resources/ resources/33fb071a-03e1-44a9-8e28-5d41ab25b73e/Safe_Harbor_Policy.pdf.

Courts Must Consider the Use of Generative AI in Administrative Processes

Courts have a fiscal responsibility to provide services in the most cost-effective manner available. COSCA's 2001 position paper on effective judicial governance and accountability states this obligation simply as "modern technological innovations must be fully utilized."[29]

COSCA believes that generative AI is poised to change the workplace as dramatically as the introduction of computers and case management software did in the early 1980s. We believe it can be used to substantially improve employee processes in many areas beyond legal research.

Courts need to think big about changing how work gets done. Ryan Roslansky, the CEO of LinkedIn estimates that for 80% of their employees, AI will be able to automate up to 25% of their routine daily tasks.[30] Instead of thinking about positions that may benefit from the use of AI, the key to determining where to use generative AI is to consider the tasks that make up individual positions and then decide which tasks should be automated through AI, augmented through AI or left as a solely human task.[31]

Like many employers in recent years, state courts across the country face difficulties in recruiting and retaining staff.[32] The resulting efforts to maintain services with fewer employees can lead to heightened stress and burnout for those who choose to support the rule of law by working in the courts. Generative AI offers great promise in reducing the burdens of understaffing. Imagine some tasks that can be performed 24/7 by an AI application that never gets tired, hungry, sleepy or needs to be paid overtime. AI is already being utilized in some state courts to complete repetitive tasks such as identifying document types and reviewing them to ensure that they contain required information.[33] Allowing AI to handle rote tasks frees staff to address more complex work that may require interpretation, a choice of responses, or exercising a level of discretion in determining the next step in the court process.

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[29] Conference of State Court Administrators. Position Paper on Effective Judicial Governance and Accountability. December 2001. Found at: https://cosca.ncsc.org/__data/assets/pdf_file/0023/23369/judgovwhitepapr.pdf

[30] Roslansky, Ryan. *Talent Management in the Age of AI*. Harvard Business Review. December 4, 2023. Found at: https://hbr.org/2023/12/talent-management-in-the-age-of-ai.

[31] Ghosh, Bhaskar, H. James Wilson, and Tomas Castagnino. *GenAI Will Change How We Design Jobs*. Here's How. Harvard Business Review. December 5, 2023. Found at: https://hbr.org/2023/12/genai-will-change-how-we-design-jobs-heres-how.

[32] Alicea-Lozada, Dimarie. *Court Employee Shortages: Still a Concern*. National Center for State Courts, Trending Topics. July 5, 2023. Found at: https://www.ncsc.org/information-and-resources/trending-topics/trending-topics-landing-pg/court-employee-shortages-still-a-concern

[33] Examples of courts where generative AI is already in use by the Clerk of Court include Maricopa County, Arizona, Palm Beach, Florida and Tarrant County, Texas.

Although not all of these areas are currently ripe for implementation, courts should consider the use of generative AI in:

- Assisting staff in responding to client requests through self-generating chatbots
- Analysis of unstructured data for research purposes
- Searching unstructured and structured data to identify privacy concerns
- Automating workflow to move information between staff
- Automating workflow to identify documents and docket them accordingly
- Summarizing court decisions and court rules in plain language
- Creating initial drafts of correspondence
- Providing initial legal research and a summary of findings
- Preparing initial transcripts from video and audio recordings
- Using voice interpreter applications for front counter visitors
- Translating an initial version of documents into target languages
- Managing website content to allow plain language searches and returning results in consumable bites that summarize results and suggest further areas of interest
- Auditing financial documents for unusual patterns of billing or payments
- Automating distribution of incoming phone calls based on caller's tone or word choices
- Creating training documents
- Drafting job descriptions and court policies

Many courts have been stymied in their ability to improve customer service due to a lack of available staff to undertake the labor-intensive tasks of creating and maintaining the waterfall questions and processes necessary to program chatbots[34] and auto-complete forms. As an early adopter of generative AI, the Nevada courts have already introduced a generative AI chatbot for their self-help website.[35]

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[34] For information and guidance on how to create a chatbot for your court, see NCSC's *Court ChatBots: How to Build a Great Chatbot for Your Court's Website*, found at: https://www.ncsc.org/__data/assets/pdf_file/0032/97187/Court-Chatbots.pdf.

[35] The website can be found at: https://selfhelp.nvcourts.gov/?enter=1. The Nevada Courts are also working on inserting generative AI into their guardianship review app to screen financial reports for potential red flags.

Similarly, researchers have been stymied by the inability of courts to provide data that is routinely found in court documents but not entered into case management systems as discrete data elements. With appropriate privacy protections in place, generative AI has the ability to make these cost-prohibitive and time-consuming services available to courts of all sizes.

Because generative AI is still evolving in most applications, any introduction of the technology should follow basic problem-solving logic to ensure that a solution is crafted that addresses the issue rather than simply managing the symptoms of the problem. Courts should identify evaluation criteria and the data elements necessary to measure the outcomes of a pilot program prior to implementing generative AI solutions. These pre-pilot steps should include a discussion on how any data that is currently designated by law or court rule as confidential will be used by the generative AI tool.

Court leaders interested in utilizing AI to address staffing needs should consider not only the possible tools, but also their implications. These include managing employee expectations, employee antipathy toward AI[36], anticipating collective bargaining issues, and addressing questions such as which positions will require re-training and which will be displaced. As noted in a recent article, to successfully share tasks between workers and AI agents, education programs for employees will need to expand to include training on the three dimensions of the individual, the organization and the AI tool itself.[37]

Although there is a natural inclination for funding bodies to assume technological advances will reduce the number of staff needed, it usually does not. Most often, courts are already below staffing needs so an increase in efficiency mitigates the need for future staff in the same position. At the same time, courts must also consider whether additional IT, attorney and education positions will be necessary to support new AI processes.

Generative AI raises issues that differ from those raised by other types of technology and the way those issues are handled needs to be different. Historically, technological innovations, from the printing press to driverless cars, introduced new legal and ethical issues that courts then decide on a case-by-case basis to slowly create a body of law. That body of law creates a legal framework that guides future choices. The nature of generative AI and the rapidity at which it is affecting all facets of modern life means that our historical legal paradigm is shifting. Whether it appears in the substance of a case, in the introduction of evidence or legal pleadings or is used by court staff to process cases, assist litigants or expedite internal processes necessary to manage a court system, generative AI is already on the doorstep of every court system.

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[36]   Horrigan, Amanda Gengler. *Understanding the Impact of AI on Team Performance: Challenges and Insights for Successful Integration.* Columbia Business School. Business & Society. July 10, 2023. Found at: https://leading.business.columbia.edu/main-pillar-digital-future/business-society/integrating-ai-teams.

[37]   Hamirani. *Here's How Generative AI will Redefine the Workplace.* Forbes. February 19, 2024. Found at: https://www.forbes.com/sites/qhamirani/2024/02/15/heres-how-generative-ai-will-redefine-the-workplace/.

Courts must prepare systems to rapidly respond to changes as the technology develops. To do this, COSCA recommends that every court establish a taskforce to assist the court in developing a responsive and flexible institutional framework for the use of generative AI in the courts.[38]

A taskforce that is separate from any existing court technology committee or advisory body on technology is recommended because the questions raised by generative AI are more than technical. Among other things, initial considerations of a taskforce will touch on the regulation of internal court personnel and external entities and individuals, procedural and legal issues related to pleadings and evidence, data governance, and human resource management within the court system. The task force should consider whether existing court rules — the code of judicial conduct, professional responsibility rules, and evidence rules — are sufficient as currently written or if they need to be adjusted to address issues unique to the development of AI. As noted by one scholar, "Technology may demand a legal response when it removes constraints, restructures power relations, or otherwise destabilizes the balance of interests the law was previously calibrated to achieve."[39]

A taskforce with diverse membership will assist the court in developing a proactive and cohesive strategy for identifying generative AI issues and opportunities. In addition to a membership that includes court leaders, the taskforce should be informed by those outside the legal system such as representatives of the legislative and executive branches, and university and industry professionals who are actively engaged in the study, development, or implications of generative AI. Experts in legal, IT and generative AI ethics should be invited to address the taskforce as it begins its work and brought back as needed to address specific questions. Because of its potential to permeate into every level of the court system, an AI taskforce should include non-traditional members such as IT and trial court line staff. Many implementation hurdles can be avoided if staff understand the intent of policies and future goals of the court and are available to educate policymakers about system capabilities and actual daily procedures as decisions are being made.

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[38] To learn how courts and state governments are addressing generative AI, see the NCSC Resource Center at https://www.ncsc.org/consulting-and-research/areas-of-expertise/technology/artificial-intelligence/state-activities/resource-center.

[39] Ard, B.J. *Making Sense of Legal Disruptions.* Wisconsin Law Review. November 13, 2022. Found at: https://wlr.law.wisc.edu/making-sense-of-legal-disruption/

Depending on the structure of the court system, the charge of a taskforce might include developing guiding principles for the responsible use of AI [40] and recommending a general use policy[41]; reviewing existing privacy and security rules and policies, reviewing the rules of evidence and procedural rules, reviewing the ethical and practical considerations of expanding the court's role in access to justice, and exploring the potential to reform court processes and the administration of the court system.[42]

It is tempting to start taskforce work with these two questions, "How can we best use AI?" and "How can we mitigate or minimize the risks of using AI?" A better approach is to first decide what problem a court is trying to solve, and then develop possible solutions, before turning to the question of whether there is an AI tool that will support the solution. In other words, start with the problem, not the technology. AI might be helpful or it might not, but what should guide your inquiry into possible technological help should be the needs of your court, not a desire to use one particular piece of software.[43]

In conclusion, COSCA believes that generative AI is neither the panacea nor the poison that it has been breathlessly proclaimed by the vendors and the pundits. It is a tool that court systems need to understand and deploy to further their collective mission to provide equal justice for all in a manner that is fair, effective, and efficient.

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[40] For example, see the New Jersey Judiciary's Statement on Principles for the use of AI, found at: https://www.njcourts.gov/sites/default/files/courts/supreme/statement-ai.pdf

[41] For example, see the Connecticut Judicial Branch Policy on the Use of Artificial Intelligence, found at: https://www.jud.ct.gov/faq/CTJBResponsibleAIPolicyFramework2.1.24.pdf

[42] For example, See, Arizona's Steering Committee on Artificial Intelligence and the Courts, found at: https://www.azcourts.gov/cscommittees/Arizona-Steering-Committee-on-Artificial-Intelligence-and-the-Courts;

[43] Zach Zarnow, the NCSC Deputy Managing Director of the Access to Justice Team, has developed a series of questions to assist taskforces in their work:

- What problem am I trying to solve?
- What is the population that we will be experimenting on? If things go wrong, who will be harmed and at what potential cost?
- What data privacy and security protections are in place, and do they meet the needs of this population and my court?
- What proof do I have that this AI tool works, and works well?
- How is this tool sustainable? What proof do we have that it will be long lasting? Is it likely to improve? If not, will it regress?