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ANALYSIS

Generating Buzz: Judicial Scrutiny of AI Use and Its Impact on the Future of Litigation

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Artificial Intelligence

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Generative artificial intelligence (GenAI) is rapidly transforming the legal landscape. Prominent legal research giants such as Westlaw, Lexis and Casetext have all announced the integration of GenAI technologies into their various offerings. From automating and enhancing research, to streamlining the process of document review, and even drafting documents, GenAI holds great potential to transform the legal industry.

However, this transformative power comes with its own set of challenges. Overreliance and misuse of GenAI tools have been prominently featured in the news, where lawyers admitted to using GenAI tools to draft briefs but failed to identify AI-generated fictitious citations. In the most high-profile case of this kind, *Mata v. Avianca*, the court sanctioned counsel for that oversight. *See* Case No. 22-CV-1461 (S.D.N.Y. June 22, 2023); *see also, e.g.*, *People v. Crabill*, No. 23PDJ067, 2023 WL 8111898 (Colo. O.P.D.J. 2023) (suspending attorney); *Park v. Kim*, No. 22-2057 (2d Cir. Jan. 30, 2024) (referring attorney to Grievance Panel for investigation and for consideration of referral to Committee on Admissions and Grievances for submitting brief relying on non-existent ChatGPT-generated citations).

These sorts of errors, while rare for now, have prompted new guidance from state bar associations, and standing orders or revised rules from federal and state courts and judges addressing lawyers' use of AI tools. As shown on Ropes & Gray's AI Court Order Tracker, although the majority of these AI-related standing orders and local rules specifically address *generative* AI (18 of 25), seven orders are applicable to AI *generally*, potentially sweeping in a broad range of litigation or research tools.

This distinction is crucial: legal practitioners have used various AI tools for years, from machine learning for contract analysis, to legal research databases like Westlaw and Casetext, to predictive coding, which substantially overhauled how lawyers conduct document review.

While GenAI can generate new content, traditional AI tools do not, and a failure to distinguish between them can result in disclosure requirements for the use of even common tools such as an internet search. For instance, although the Texas 394th Judicial District's standing order requires certification that anything "created or contributed to by [GenAI]" is verified as accurate, the order applies to anyone utilizing "*any* form of [AI] for legal research or drafting" (emphasis added; *see also* standing orders of two judges from the Northern District of Illinois).

As AI-related orders proliferate, precise language specific to GenAI will be increasingly important. But even where court orders do address GenAI directly, the variety in their scope and language will undoubtedly have different impacts across the country. Lawyers must therefore ensure they understand the categories and nuances of these orders—and their potential effect on different parties and cases.

Types of AI-Related Orders and Their Potential Impacts on Litigation

There are three broad categories of AI-related standing orders and local rules: disclosure (often requiring accuracy verification), prohibition (barring AI in whole or in part) and cautionary (typically relying upon existing rules). Whether courts look to existing orders as templates, or implement unique requirements to differentiate their orders (as some have done), each category of court order bears the potential to shape the future of judiciary directives, the development and adoption of AI tools within the legal industry, and the balance of power between different types of parties and practitioners within the courtroom.

Disclosure

Across the United States, 19 courts and judges have adopted orders and local rules mandating disclosure of the use of AI in legal filings, making this the most common style of order. These requirements typically involve informing the court about *GenAI* usage, with variations ranging from simply acknowledging its use to submitting attestations of accuracy-verification. The U.S. Court of Appeals for the Fifth Circuit's proposed rules, for instance, call for both disclosure and certification when GenAI is employed in "drafting" filed documents.

Disclosure carries clear advantages. Because, as one Northern District of Texas judge noted, GenAI "can make stuff up," well-tailored transparency measures can curb overreliance on GenAI and significantly reduce the risk of fictitious citations.

But disclosure has drawbacks, too. Similar to initial hesitancy surrounding the adoption of predictive coding in e-discovery, mandatory disclosure of AI use might deter some lawyers (and particularly law firms that handle sensitive cases or represent high-profile clients averse to the potential for added scrutiny) from using the technology. Additionally, broadly worded orders—such as those addressing the use of AI in "preparation" for filings—could sweep in any AI-powered *research*, potentially burying disclosure of the AI-generated *drafting* which courts may want to scrutinize more closely.

Although most AI-disclosure orders are relatively straightforward to comply with, some orders have made these requirements more challenging in ways that could deter litigants with limited resources from using GenAI. For instance, a Northern District of California judge not only requires disclosure and confirmation of accuracy of AI-generated content (under penalty of sanction), but also requires "lead trial counsel . . . personally verif[y] the content's accuracy," while also mandating that counsel "maintain[] records of all prompts or inquiries submitted to any generative AI tools."

Where orders impose obligations on specific lawyers, practitioners with smaller teams or fewer resources could find themselves disproportionally burdened compared to larger law firms. And in cases involving large volumes of files, verifying generated content may prove surprisingly time-consuming. Additionally, mandating preservation of GenAI prompts (the equivalent of search queries) could create complications related to privilege and work product.

Prohibition

Just two orders currently fall into this category, and are likely a result of concern over incorrect case citations created by GenAI. While banning AI will certainly prevent such situations, prohibition merely serves to temporarily impede the adoption of new technologies, rather than refine GenAI's quality and usage practices.

Bans on AI in courtrooms may prove even more harmful than the potential inequities of disclosure requirements discussed in section (i) above. A standing order from the Southern District of Ohio currently forbids any party or attorney from "us[ing] [AI] in the preparation of any filing submitted to the court." While the order clarifies that it does not apply to "information gathered from legal search engines," broad prohibitions of this form stand to prevent the potential equalizing benefits that GenAI can bring.

GenAI potentially empowers smaller law firms, public interest advocates, and pro se litigants to more capably challenge larger opponents, but outright bans entirely foreclose that possibility—particularly where such bans apply only to certain parties but not others. The Eastern District of Missouri, for instance, broadly prohibits "any form of generative [AI]," but only for *pro se* litigants.

Although parties unfamiliar with the intricacies of either the law or the large language models that power GenAI may be at the most risk for misusing AI tools, such parties perhaps also have the most to gain from the proper use of such tools.

Cautionary

In contrast to disclosure and prohibition orders, cautionary orders are probably the least likely to impede the legal industry's adoption of GenAI because they do not impose additional rules or requirements upon practitioners. Cautionary orders urge counsel to follow existing ethical and legal rules without restricting usage of GenAI. This may achieve many of the same benefits as disclosure requirements—by reminding lawyers to carefully examine any AI-generated content—without chilling adoption of the technology.

On the other hand, without certifications of accuracy, lawyers could neglect to do just that, as seen in cases like *Mata v. Avianca*. That exact concern may be why most courts to take a stance on the issue have required some form of disclosure (to date, there are only four orders which specifically urge caution without imposing additional requirements).

Unique Orders

In addition to adopting orders that fit within one of these three broad categories, some judges have adopted unique variations or distinct language, which may indicate the direction of future AI-related orders. For example, a recent order from the District of Hawaii has taken a slightly different approach. While requiring the standard disclosure and verification common in many courts, the order also applies to any "unverified source," a term of art which the judges define as including both GenAI-created content *and* content "drafted by persons compensated to produce materials not tailored to specific cases."

While the latter subcategory does not impose particularly distinct requirements for users of GenAI, it is notable that a court is equating GenAI tools with human-created content—a move which may signal a trend toward acceptance of GenAI as merely one tool among many for litigants.

Conclusion

The GenAI legal landscape is in flux, shaped by many factors, including a judiciary with diverse opinions on AI. Well-reasoned court orders that encourage responsible use without chilling or stifling use of new technology will directly impact both the acceptance and quality of legal GenAI software. As Chief Justice John Roberts acknowledged, AI brings the "potential to increase access to justice, particularly for litigants with limited resources."

Reasonable judicial scrutiny can help ensure GenAI serves as a valuable tool that empowers parties across the board and helps to create a more fair and efficient legal system. As GenAI continues to evolve, courts, bar associations and responsible technology development will all play vital roles in shaping its ethical and effective integration into the practice of law.

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