

Don't Reinvent the Wheel: Approaching Gen AI Usage in Litigation

Ethical and regulatory guidance is emerging, but what of practical day-to-day considerations? What current actions should a mindful practitioner with an existing caseload take in order to fulfill the ethical obligation of competence found within the Rules of Professional Conduct?

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The legal industry is in the early stages of a transformative era brought on by developments in generative artificial intelligence (Gen AI) and the proliferation of Gen AI tools with specific uses to all facets of legal practice. Law firms, their clients, and courts are beginning to wrestle with the ethical and practical questions posed by AI's increasing role in litigation and the resulting transformation of how we work.

Ethical and regulatory guidance is emerging, but what of practical day-to-day considerations? What current actions should a mindful practitioner with an existing caseload take in order to fulfill the ethical obligation of competence found within the Rules of Professional Conduct? How to navigate litigating cases in a Gen AI world, especially when one might not yet be entirely comfortable with what Gen AI tools can do? Litigators wrestling with these concerns may find solace in knowing that a slight reframing of inquiries into client and party use of Gen AI is all that is required—for now—to be well-placed to navigate an ever-changing Gen AI landscape.

Gen AI's Transformation and Sources for Guidance

The good news about Gen AI is that helpful guidance is beginning to arrive. Excellent articles on the ethical considerations implicated by Gen AI use are now being published across the legal industry, including recent commentaries appearing in *The Legal Intelligencer*. The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility and the Philadelphia Bar Association Professional Guidance Committee recently released Joint Formal Opinion 2024-200 ([Ethical Issues Regarding the Use of Artificial Intelligence](#)), which is intended to give advisory guidance on the ethical use of AI by attorneys and law firms.

Courts have additionally issued standing orders governing the disclosure of any use of AI. As a recent example, U.S. District Judge Karoline Mehalchick issued a civil practice order in the U.S. District Court for the Middle District of Pennsylvania requiring a certificate declaration of AI usage for court filings. The standing order follows those issued by a handful of courts across the country and requires a party to make a declaration if a Gen AI tool was used in the preparation of

any document filed in any matter pending before Mehalchick. (Standing Order “In re Use of Generative Artificial Intelligence (‘AI’)” for Civil Cases Before District Judge Karoline Mehalchick (M.D. Pa. Sept. 9, 2024)). This declaration must include information as to: the specific AI tool used; which portions of the filing were prepared by the AI tool; and that a person has checked the accuracy of any portion of the document generated by AI.

As time passes, more guidance and instruction will provide further clarity, however, this will likely only be meaningful after the non-theoretical pitfalls of Gen AI use are borne out and lawyers in the real world come to terms with the potential challenges and dangers posed by usage of Gen AI tools. Most of the current advice and instruction focuses on the lawyer’s use of Gen AI, yet a lawyer or law firm is just one of many stakeholders in litigation. Clients, insurance companies, experts, and the opposition are all likely experimenting with the use of Gen AI with varying levels of means, experience and competence.

Facing this, attorneys need to retool case management steps in client inquiry and discovery to include a focus on gathering information on Gen AI usage, even if no application for that information is immediately available. While an attorney may not be able to predict where in a particular case a Gen AI issue may arise, there is information out there that can inform such an issue.

Gen AI Inquiries to Clients

Lawyers with existing or new cases should begin any evaluation of Gen AI usage with their own clients. While it is unlikely that all existing litigation matters involve Gen AI application, attorneys should still establish

through their initial inquiries to clients what—if any—Gen AI tools are currently being used. These inquiries can be folded into existing data mapping efforts of a client’s technological infrastructure and data sources.

Data mapping is the identification and inventorying of an organization’s data and technology infrastructure. This will usually include the identification of: the types of data an organization generates, uses, and stores; its format and accessibility; the backup procedures and records retention policies in place; the determination of whether an organization’s IT structure is hardware-based or web-provided; the identity of any service provider; and the scope of the provided services. Including inquiries into Gen AI usage as part of an initial data mapping effort will allow a mindful practitioner to identify the specific Gen AI tools used by the client and the individual users who interfaced with them, the data intake or input sources provided to the Gen AI tools, and what material has been created via Gen AI use.

Incorporating these inquiries into comprehensive data mapping at the outset of representation should provide attorneys with an early understanding of the scope of the client’s current Gen AI usage and inform any future discovery considerations, especially as it pertains to the identification and collection of Gen AI-created material. Additionally, a thoroughly performed data mapping effort that specifically includes inquiry into Gen AI use will more than likely provide the information required to be included in any court-mandated disclosure that exists now or may come to exist in the life of the litigation.

Once the initial inquiry is conducted, it would be sensible to provide a companion litigation hold instruction to the client that all use of Gen AI that pertains to the parties in the litigation or the issues raised within it should be tracked and maintained. This may extend to material that does not appear to be immediately related to the specific litigation or claim. Consider the example of an employment discrimination claim based upon applicant screening performed by your client. The use of Gen AI to screen applicants that led to the claim would obviously be important to identify and maintain. On the other hand, any implementation or use of Gen AI that occurred after the date of the subject claim may not initially appear to be directly related. Despite this, the input data sets used by the client company or vendor to train the model may have direct relevance to the screening preferences implicated by the discrimination claim.

A litigation hold instruction will allow the attorney to be informed by the client of new developments that could bear relevance to the matter. Even simply advising the client that any adoption of Gen AI usage should be disclosed to the attorney may provide a starting point for an appropriate follow-up inquiry. It is worth noting again that while it may be difficult to predict what impact Gen AI use will ultimately have on litigating any specific matter, gathering the information that is available now is the best starting point to address any issue that may arise.

Gen AI Discovery Inquiries

Litigators can take guidance from the information sought by the disclosure requirements that courts have begun to issue in standing orders. These disclosure requirements serve to alert attorneys to the use of

Gen AI tools in composing portions of court filings. However, the same information required to be identified to the court can be the starting point for discovery into the use of Gen AI by a party or third-party.

Discovery or subpoena requests could include: the identification of any Gen AI tool used in the creation of any document pertinent to the litigation or that was used during the investigation into the litigation itself; the users providing the inputs to the Gen AI tool; the inputs and data or documents provided to the Gen AI tool; the vendor agreements pertaining to those tools; and (5) the process for review of the inputs and generated material produced. Not only can these requests serve to guide an issue-specific inquiry and focus e-discovery efforts, but the information obtained in such discovery may have future uses in witness identification and document authentication. Third-party subpoenas to vendors or developers of the Gen AI tools used by an opposing party may be necessary to adequately investigate issues pertaining to how Gen AI tools were trained or the datasets provided by companies in order to receive services.

Gen AI Inquiries—Case Management Considerations

A final point for consideration is one that can be drawn from existing practice approaches to e-discovery management and protective order practice. Addressing Gen AI issues via a case management order (where appropriate) is an effective means of preserving any right to seek inquiry, challenge a party's efforts to obtain such discovery, or revisit the issue as the evolution of Gen AI impacts an existing piece of litigation.

Courts have yet to fully outline the boundaries of Gen AI-related discovery. What is discoverable? Who performed the task, an employee or the tool itself? What might be considered work product? These are questions that courts will likely need to address in the coming years as the industries served by the legal professions feel the impact of Gen AI's transformation. Attorneys wishing to place Gen AI issues in front of the court's attention may wish to raise these issues via case management protocols pertaining to e-discovery or confidentiality. Slightly re-tooling existing e-discovery or confidentiality orders to include considerations as to Gen AI usage provides another opportunity to gain—or limit—the disclosure of such information.

The very nature of AI makes predicting how litigation will be transformed is both excit-

ing and probably impossible. Uncertainty will exist for every attorney because the litigation landscape will remain in a near-constant state of evolution. Rather than worrying about a need to reinvent the wheel, incorporating a focus on Gen AI issues into the steps that are already familiar to litigation practice will provide a sense of stability and, hopefully, lessen concerns as to how to navigate the early days of the Gen AI litigation world.



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