Lawyer Insights

Pitfalls Of Attorney AI Use In Brief Prep Has Judges On Alert

By Matthew Nigriny and John Gary Maynard
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Generative artificial intelligence — which has recently emerged as a powerful tool on many fronts — has made quite the splash since the beginning of the year.

The interest in this new technology is understandable given its utility in myriad applications.

Generative AI provides capabilities for ease of research and compiling information, data analysis and understanding, drafting text, creating images and other content, and more. But along with this new technology comes unintended consequences and the opportunity for abuse, and the legal system is taking notice.

A rapidly growing number of people have begun to rely on generative AI to draft text in various circumstances, including in school and the workplace.

For example, a survey from January by the online magazine Intelligent revealed that 30% of college students have used OpenAI's ChatGPT to draft an essay assignment and 60% of those students admit to using ChatGPT for more than half of their total work.[1]

Reliance on generative AI to draft text is not limited to the academic setting and has already started to infiltrate the legal profession.

Some lawyers are attempting to leverage generative AI as a brief drafting tool, which may serve to greatly reduce the burden of motion practice.

But as seen in several recent cases, generative AI is not perfect and blind reliance on this tool can be very risky.

In Roberto Mata v. Avianca Inc., two attorneys relied on AI to draft a brief that they subsequently filed in May in the U.S. District Court for the Southern District of New York. In an order to show cause, the court discussed the brief, noting that "six of the submitted cases appear to be bogus judicial decisions with bogus quotes and bogus internal citations."

The court subsequently sanctioned the attorneys for failing to verify the citations and further failing to initially admit the mistake.

In June, the court released an opinion and order on sanctions specifically acknowledging that "[t]echnological advances are commonplace and there is nothing inherently improper about using a reliable artificial intelligence tool for assistance"; however, "existing rules impose a gatekeeping role on

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attorneys to ensure the accuracy of their filings."

In addition to a monetary penalty, the court ordered the attorneys to not only send an explanatory letter to their client, but also to each of the judges that ChatGPT falsely cited as authors of fake opinions in their brief.

The New York case is not an isolated incident, as a Colorado attorney suffered the same pitfall. In a contract case, a defense attorney relied on ChatGPT to perform legal research in a brief seeking to set aside summary judgment.

Again, ChatGPT fabricated many of the cases the attorney included in the brief filed with the court. The court in this case threatened to file a complaint against the attorney, but it is unclear if it has yet done so.

In the face of these cases, more than one judge has attempted to get out in front of generative AI-based drafting problems. In early June, Judge Brantley Starr of the U.S. District Court for the Northern District of Texas released what appears to be the first standing order regulating use of generative AI in court filings.

Judge Starr's new order[2] requires the following:

All attorneys and pro se litigants appearing before the Court must, together with their notice of appearance, file on the docket a certificate attesting either that no portion of any filing will be drafted by generative artificial intelligence (such as ChatGPT, Harvey.AI, or Google Bard) or that any language drafted by generative artificial intelligence will be checked for accuracy, using print reporters or traditional legal databases, by a human being.

He is calling this a "Mandatory Certification Regarding Generative Artificial Intelligence" and he will strike any filing from a party that does not include the required certificate — attorneys "will be held responsible under Rule 11 for the contents of any filing that they sign."

His order alleges this restriction is necessary because generative AI is not well suited to writing legal briefs due to: (1) its propensity to "make stuff up — even quotes and citations" and (2) the chance that the AI incorporates some type of unknown or unanticipated bias.

Judge Starr observes that while attorneys have sworn to set aside personal prejudices and biases, programmers of generative AI products have sworn no such oath.

Other judges appear to be quickly following suit.

For example, after Judge Starr issued his order, Judge Stephen Alexander Vaden of the U.S. Court of International Trade issued an order[3] requiring attorneys to provide "[a] disclosure notice that identifies the program used and the specific portions of text drafted with the assistance of that program" and "[a] certification that the use of the program has not resulted in the disclosure of any confidential or business proprietary information to any unauthorized party."

And Judge Michael Baylson of the U.S. District Court for the Eastern District of Pennsylvania issued a one-line order[4] requiring attorneys to disclose if they have used AI in the creation of documents filed in his court and to certify that each citation to the law or record has been verified with the appropriate legal source(s) as accurate.

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The landscape thus appears to be shifting quickly. We have yet to see any orders flatly barring the use of generative AI, but it may be possible that one or more courts could take the position that generative AI has no place in the briefing process.

At a minimum, however, it is very likely that orders defining how and when generative AI may be used, as well as requiring AI certifications as to accuracy, will become even more prevalent in the coming months.

The message seems to be coming into focus — even if courts do not ban the use of generative AI, they will at least hold attorneys responsible for the mistakes created by generative AI. There are many bases for this conclusion.

For example, under Rule 1.1 of the [American Bar Association](#)'s Model Rules of Professional Conduct, lawyers have a duty of competence whereby "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

Failure to ensure accuracy of AI-created content and case citations certainly falls short of the requisite "thoroughness and preparation reasonably necessary for the representation."

Moreover, Rule 5.3 of the ABA's Model Rules of Professional Conduct defines a lawyer's responsibilities when utilizing nonlawyer assistance.

This rule does not contemplate use of generative AI, but the spirit of the rule likely applies, and it requires that "a lawyer having direct supervisory authority over the nonlawyer [i.e. generative AI] shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."

Certainly, making up case law and citations is incompatible with the professional obligations of the lawyer.

It is ultimately the responsibility of attorneys to not make material misrepresentations of fact or law to the court, and attempting to work more efficiently, even if it is for the benefit of a client, does not obviate this fundamental responsibility.

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Notes

1. https://www.usatoday.com/story/news/education/2023/03/01/what-teachers-students-saying-ai-chatgpt-use-classrooms/11340040002/

2. Judge Brantley Starr | Northern District of Texas | United States District Court (uscourts.gov).

3. Artificial Intelligence Order (uscourts.gov).

4. Standing Order: Re Artificial Intelligence In Cases Assigned To Judge Baylson (uscourts.gov).

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